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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 584

YETTA STROMBERG, APPELLANT

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

FILED DECEMBER 9, 1930

(35506)

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1 In Superior Court of San Bernardino County this 26th day of August, A. D., 1929

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

VS

BELLA MINTZ, ESTER KARPELIFF, I. BERKOWITZ, SARAH CUTLER, YETTA Stromberg, Jennie Wolfson, and Emma Schneiderman, defendants

Information

Bella Mintz, Ester Karpeliff, I. Berkowitz, Sarah Cutler, Yetta Stromberg, Jennie Wolfson, and Emma Schneiderman are accused by the district attorney of the county of San Bernardino, State of California, by this information of the crime of using and displaying a red flag, a felony, committed as follows:

The said Bella Mintz, Ester Karpeliff, I. Berkowitz, Sarah Cutler, Yetta Stromberg, Jennie Wolfson, and Emma Schneiderman on or about the 3rd day of August, 1929, and prior thereto, in the said county of San Bernardino, State of California, did wilfully, unlawfully, and feloniously display a red flag and banner in a public place and a meeting place as a sign, symbol, and an emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propaganda that is and was of a seditious character.

And for a further, second and separate cause of action the said defendants above named and each of them are accused by the district attorney of the county of San Bernardino, State of California, by this information, of the crime of conspiracy to use and

2 display a red flag, a felony, committed as follows:

The said defendants above named and each of them on or about the 3rd day of August, 1929, and prior thereto, in the said county of San Bernardino, State of California, did wilfully, unlawfully, feloniously, and corruptly conspire and confederate together and agree to wilfully, unlawfully, and feloniously display a red flag and banner in a public place and a meeting place as a sign, symbol, and an emblem of opposition to organized government and as an aid to propaganda that is and was of a seditious character.

Contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California.

GEO H. JOHNSON,
District Attorney in and for said County of San Bernardino, State of California.
By WARDWELL D. EVANS,
Deputy District Attorney.

Presented by the district attorney in open Superior Court of the State of California, county of San Bernardino, and filed as a record of said court this 26th day of August, A. D. 1929.

HARRY L. ALLISON, *Clerk.*
By R. W. MIFFLIN, *Deputy.*

3–4 [Minute entry of arraignment omitted in printing.]

5 In Superior Court of San Bernardino County

[Title omitted.]

Order overruling demurrer—Sept. 3, 1929

This being the time heretofore continued to for time for defendants to plead, the defendants are present with their counsel, Leo Gallagher and John Beardsley, Esqs., and the district attorney is also present.

At this time defendants by their counsel, present and file their demurrer to the information.

Defendants demurrer to the information is overruled.

The defendants each in person pleads that she is "not guilty as charged in the information." Set for trial Sept. 30, 1929, at 10:00 o'clock a. m., dept. 1. Jury ordered.

6–21 [Minute entries of trial omitted in printing.]

22–26 In Superior Court of San Bernardino County

Instructions to jury

27 No. 17

You are instructed that the defendants in this case are charged with two offenses as charged in two counts of the information.

In this connection you are instructed that if the jury should believe beyond a reasonable doubt that the defendants, or either of them, displayed; or caused to be displayed, a red flag, banner, or badge, or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place, as charged in count one of the information, and if you further believe from the evidence beyond a reasonable doubt that said flag, badge, banner,
or device was displayed, or caused to be displayed, as a sign,
28–31 symbol, or emplem of opposition to organized government, or
was an invitation or stimulus to anarchistic action, or was in aid to propaganda that is of a seditious character, you will find such defendants guilty as charged in count one of the information.

In this connection you are instructed that if you believe a red flag, such as herein described, was displayed in either of the places mentioned in said information, that it is only necessary for the prosecution to prove to you, beyond a reasonable doubt, that said flag was displayed for any one or more of the three purposes men-

tioned in the information; in other words, if the prosecution should prove to you beyond a reasonable doubt that the red flag, such as herein described, was displayed at the place or either of said places and for the purposes and objects as alleged in said information, it is only necessary for the prosecution to prove to you beyond a reasonable doubt that said flag was displayed for only one or more of the three purposes alleged in said information, and it is not necessary that the evidence show, beyond a reasonable doubt, that said red flag was displayed for all three purposes charged in said information. Proof, beyond a reasonable doubt of any one or more of the three purposes alleged in said information is sufficient to justify a verdict of guilty under count one of said information.

Given.

ALLISON, *Judge.*

32 [Verdict omitted in printing.]

33–35 [Motion for new trial omitted in printing.]

36 In Superior Court of San Bernardino County. Dept. 1

Wednesday the 23rd day of October, 1929, at 2.00 o'clock p. m.

Present: Hon. Chas. L. Allison, judge; Harry L. Allison, clerk; by I. W. Mifflin, deputy. Walter A. Shay, sheriff, by John Marshall, deputy.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
BELLA MINTZ, ESTER KARPELIFF, JENNIE Wolfson, Yetta Stromberg, and Emma Schneiderman | No. Cr. 2032.

Judgment

The district attorney with the defendants and their counsel, John Beardsley, Esq., came into court.

It is stipulated by counsel that hearing on motion to set aside the verdict of the jury and grant a new trial and motion in arrest of judgment and time for pronouncing judgment be set at this time.

It is therefore ordered that the order heretofore made setting said motions and time for pronouncing judgment at 4.00 o'clock p. m. on this date be and is hereby vacated and said motion to set aside the verdict of the jury and grant a new trial, motion in arrest of judgment, and time for pronouncing judgment set for this time.

37 Counsel proceed with their argument on motion to set aside the verdict of the jury and grant a new trial.

Motion to set aside the verdict of the jury and grant a new trial is denied.

Motion in arrest of judgment is denied.

The district attorney with the defendant Yetta Stromberg and her counsel, John Beardsley, Esq., came into court. The defendant

Yetta Stromberg was duly informed by the court of the nature of the information filed against her for the crime of using and displaying the red flag and for the crime of conspiracy to use and display the red flag, felonies, committed on or about the 3rd day of August, 1929, and prior thereto, of her arraignment and plea of "not guilty as charged in both counts of the information" of her trial and the verdict of the jury on the 9th day of October, 1929, "guilty as charged in count one of said information and guilty as charged in count two of said information."

The defendant, Yetta Stromberg, was then asked if she had any legal cause to show why judgment should not be pronounced
38–43 against her, to which she replied she had none. And no sufficient cause appearing or being shown to the court, thereupon the court renders its judgment.

That, whereas, the said Yetta Stromberg, having been duly convicted in this court of the crime of using and displaying a red flag and conspiracy to use and display a red flag, felonies.

It is therefore, ordered, adjudged, and decreed, that the said Yetta Stromberg be punished by imprisonment in the State prison of the State of California for the term prescribed by law on count one of the information and for the term prescribed by law on count two of the information and it is directed that said defendant be taken to the warden of the State prison at San Quentin. The defendant was then remanded to the custody of the sheriff of said county to be by him delivered into the custody of the said warden of said State prison of California, at San Quentin.

44–46 [Application on appeal omitted in printing.]
47 [Order for transcript omitted in printing.]
48 [Clerk's certificate omitted in printing.]
49 [Affidavit as to service omitted in printing.]
50 [Statement of evidence omitted in printing.]

51 In District Court of Appeal of California, Fourth Appellate District

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND Respondent,
vs.
BELLA MINTZ, ESTER KARPELIFF, YETTA STROMBERG, JENNIE Wolfson, and Emma Schneiderman, Defendants and Appellants.
Criminal No. 17

Opinion and judgment filed June 27, 1930

Appeal from a judgment of the Superior Court of San Bernardino County, Honorable Charles L. Allison, Judge, in a prosecution for a violation of section 403a of the Penal Code, and conspiracy to violate the same law. Affirmed and reversed.

For appellants: John Beardsley.

For respondent: U. S. WEBB, attorney general, and John D. Richer, deputy attorney general.

The appellants were charged, in the first count of the information, with a violation of the provisions of section 403a of the Penal Code; in the second count, with a conspiracy to violate the provisions of that section. The defendant, Yetta Stromberg, was found guilty upon the first count, and all of the defendants appealing were found guilty upon the second count. From the judgments upon conviction these defendants appeal.

The part of section 403a necessary to be considered in passing upon the questions raised by the appeal, reads as follows:

"Any person who displays a red flag, * * * in any meeting place, * * * as an aid to propaganda that is of a seditious character is guilty of a felony."

We shall consider first the question raised as to the sufficiency of the second count of the information, upon which all of the defendants were convicted. It is agreed by the appellants, and admitted by respondent, that the judgment on this count, alleging a conspiracy, cannot be sustained, for the reason that no overt act of the conspirators, in furtherance of the object of their alleged agreement, is charged.

"No Agreement amounts to conspiracy, unless some overt act, besides such agreement, be done within this State, to effect the object thereof, * * *." (Penal Code, section 184.)

"Upon a trial for conspiracy, * * * the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, * * *." (Id., section 1104.)

This disposes of the case except as to the judgment against defendant Yetta Stromberg upon the first count.

53 In the briefs filed by appellants it was urged that the trial court committed errors in the charge to the jury, but in the oral argument to this court their counsel stated that he was satisfied that the instructions were correct, and waived any claim of error on that account.

From the evidence introduced at the trial it appears that there was an organization in the city of Los Angeles known as the Pioneer Summer Camp Conference, an association composed of independent organizations, some of which were communistic in character, the others having members who were Communists. The purpose for which the camp conference was organized was to establish a summer camp for children of the so-called "working class."

Several meetings of the conference were had to make arrangements for the camp and its organization, which were concluded at a meeting held on July 8, 1929. Grounds for the camp were in the hills in San Bernardino County, and it was established with the gathering together there of a number of children under the care of the defendants, and the leadership of the defendant Stromberg, who was a member of one of the communistic organizations composing the camp conference. In the minutes of the meeting on

the above date, which were introduced in evidence, as part of the directions for preparation for the camp appears this entry:

"Library: Need pamphlets and books. Try to get some at Communist Party headquarters."

54 In the conduct of the daily camp program, the first order was that the children, when they arose about 6.30 in the morning stood by their cots and saluted a red flag on which was a device of sickle and hammer, and announced themselves "ready." This flag-raising ceremony was under the direction of the defendant Stromberg. The flag used was shown to be the flag of the Communist Party, and of the "Third International," with which the party was affiliated, and of the Soviet Government of Russia. This defendant, as a witness for the defendants, testified that she had instructed the children in taking the Communist pledge, which was in these words:

"I pledge allegiance to the workers' red flag, and to the cause for which it stands, one aim throughout our lives, freedom for the working class."

In the camp library were found a number of leaflets, tracts, and papers of communistic literature, contributed by participating organizations, which were introduced in evidence over the objection of the defendants. This library was in charge of the defendant Stromberg. There was no evidence that any of the books or papers were ever read by the children. It does appear, however, that there were daily study hours, conducted by the defendant Stromberg, in which history from the communistic standpoint was taught.

55 Excerpts from these exhibits were read to the jury over defendants' objection, many of them advocating armed force to overthrow the present economic and governmental organization of the country. One quotation will illustrate many of the propositions either openly stated or broadly suggested by the texts.

"Communists do not think it necessary to conceal their views an intentions. They openly declare that their goal can be achieved only by the violent overthrow of the whole of the present social system."

All of these documents were properly admitted in evidence as tending to show that the camp was conducted as a school of armed revolutionary propaganda and that the flag was exhibited as a symbol of that teaching, and the evidence, if believed by the jury, was sufficient to support their verdict.

It is contended also that the evidence was insufficient because it was not proven that the place where the camp was located was a "public place." The expressions "public place" and "meeting place" are used in the statute in the alternative. It is sufficient to say that it could hardly be claimed that the place where these children and their attendants and instructor met was not a "meeting" place, whether it was public or not.

Misconduct on the part of the district attorney in his
56 argument to the jury is laid as one of the grounds for reversal of the case. The district attorney began a statement that the

trial was being watched with great interest not only by citizens of the county, but of the State and Nation, when he was interrupted by defendants' counsel with an objection. The judge struck out the statement, and admonished the jury to disregard it, as there was no such evidence before them, and instructed the district attorney to confine himself to the evidence. It is not likely that any jury would be much impressed by such a remark, and the prompt action of the court would certainly have dispelled any prejudicial effect on their minds.

A number of other statements of the district attorney are cited in support of appellants' contention, but, while some of them were rather florid and had perhaps as well have been left unsaid, we do not think them of such a character as to have been prejudicial to the right of the defendants to a fair trial. No objection to any of these statements was made at the time, and they cannot, for that reason, be considered on this appeal. (People v. Ong Mon Foo, 182 Cal. 697; People v. Steelik, 187 Cal. 361.)

During a midday recess of the court, one of the jurors was seen by appellants' counsel, in conversation with a witness for the prosecution. This conversation is assigned by appellants as misconduct of the juror, for which they should have been granted a new
57 trial. After the recess, appellants' counsel cross-examined the witness, who gave a circumstantial account of the conversation. There was nothing in it from which it might be even remotely inferred that it could have influenced the juror, as the subject of the trial was not mentioned between them.

Appellants contend that the trial judge was guilty of prejudicial misconduct in cross-examining one of the defendants other than the defendant Stromberg. The questions asked were whether the witness had ever forbidden or discouraged the children from taking a pledge to the flag which the defendants were charged with displaying, or knew of any order having been given to them by anyone in charge of the camp, forbidding the display of the flag or pledge of allegiance to it. There was nothing in the form of the questions suggesting any prejudice on the part of the judge, and as appellants' counsel states that he was eminently fair in his attitude toward the defendants throughout the trial the incident could have had no prejudicial effect on the minds of the jury.

The final contention of appellant is that section 403a is void as in contravention of the fourteenth amendment to the Federal Constitution, and of section 9 of Article I of the California Constitution. The part of the fourteenth amendment which might be applicable to the case is the provision that "No State shall make or enforce any law which shall abridge the privileges or immunities of citi-
58 zens of the United States."

Among these privileges, undoubtedly, are the rights of free speech and of lawful assembly, which are guaranteed by our State constitution. No matter how revolutionary, in the general sense, a doctrine may be, of our present form of Government, if its adoption

in practice is advocated by peaceful and constitutional means—and our constitutions, State and National, provide the means—the open and public advocacy of such doctrine can not be interfered with.

But it is inconceivable that the State has not the right to prohibit by penal laws the wilful and deliberate training of traitors to itself under the guise of protection of the right of free speech, particularly, as in this case, among those who by reason of youth and inexperience have no chance to form an independent judgment. Appellants' counsel concedes that sedition laws which "interdict against the use of force or violence" are consistently upheld by the courts, and all of the authorities cited by him support that proposition.

"Any person who displays a red flag—in any meeting place—as an aid to propaganda that is of a seditious character is guilty of a felony."

Sedition is defined as the stirring up of disorder in the State, tending toward treason, but lacking an overt act. Certainly the "advocacy of force or violence" in overturning the government of a State falls within that definition.

59 The statute is constitutional, and the conviction under it must be upheld.

The judgment of conviction of the defendants on the second count of the information is reversed.

The judgment of conviction of the defendant Yetta Stromberg on the first count of the information is affirmed.

STROTHER,
J. pro tem.

In District Court of Appeals of California

Opinion

We concur and dissent:

We concur in the foregoing opinion in sustaining the judgment of conviction of Yetta Stromberg, and in the conclusion reached that the judgment of conviction of all appellants under the second count of the information can not be sustained.

We dissent from the order reversing their convictions under this count without directing the trial court to grant their motion for new trial.

This prosecution was instituted under section 403a of the Penal Code which provides as follows:

"Any person who displays a red flag, banner, or badge, or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building, or window as a sign, symbol, or emblem of opposition to organized government or as an invitation or

60 stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."

As the judgments against all of the defendants under the second count of the information must be reversed, leaving only the convic-

tion of Yetta Stromberg under the first count to be considered, we will hereafter refer to her as the appellant.

The camp at which the red flag was displayed was established on a ranch near Yucaipa several miles from Redlands in San Bernardino County. This camp provided board and lodging for children. It was promoted, organized, and managed by a camp conference, which was composed of four delegates from each of six groups, most of which were affiliated with the Communist Party. This party has been functioning for some time as a political party under the name of the Workers (Communist) Party. In his brief, appellant's counsel describes her as follows:

"Only one of the defendants, Yetta Stromberg, who celebrated her 19th birthday at the camp in July, was a member of the camp conference which was responsible for the establishment and maintenance of the camp. Miss Stromberg might perhaps be termed the intellectual leader of the enterprise. She is an American girl, born of Russian parents at Cleveland, Ohio. She was graduated from Roosevelt High School in Los Angeles and had had
61 about one year in the University of California at Los Angeles. She is a member of the young Communist League and was a delegate from that body to the camp conference. At the camp she had charge of the educational hour, during which the children were instructed in economics and history and sociology and labor unionism. Among other things the children were taught class-consciousness, the solidarity of the workers and the theory that the workers of the world are of one blood and brothers all. This oneness of blood was symbolized by the red background of the flag of Soviet Russia; upon which background was superimposed a likeness of a sickle and hammer. The sickle, Miss Stromberg said, represented the farmers and the hammer represented the industrial workers.

"Beginning some days after the opening of the camp and continuing regularly thereafter until the camp was closed, the children, under the direction of Miss Stromberg, about seven o'clock each morning, stood at salute beside their beds in the open air while a camp-made representation of the red flag of Russia was raised on an orange tree prop serving as a flag pole upon a high spot a few hundred feet from the children's beds. In unison the children recited their pledge to the flag."

The red flag which was displayed at the camp and which
62 the children saluted, and to which they pledged their allegiance under the guidance and direction of appellant, was the flag of the Communist Party, as well as the flag of Soviet Russia.

A library was maintained at the camp under the charge of appellant. A number of exhibits taken therefrom bore appellant's name, some in her own handwriting, and on others her name appeared in the writing of an undisclosed person. She admitted ownership of a number of them.

Appellant's contention that section 403a of the Penal Code is unconstitutional on the ground that it is an unwarranted limitation

on the right of free speech guaranteed to the people by the Constitions of the United States and of the State of California, deserves serious consideration. She directs her argument to the phrase in section 403a of the Penal Code; "of opposition to organized government." If opposition to organized government were the only act prohibited by this section we might be forced to agree with appellant. "Opposition" is a word broad in its meaning. It has been defined as follows:

"The act of opposing or resisting; antagonism. The state of being opposite or opposed; antithesis; also, a position confronting another or a placing in contrast. That which is, or furnishes an obstacle to some result; as, the stream flows without opposition.
63 The political party opposed to the ministry or administration; often used adjectively as, the opposition press."

It might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations. Progress depends on new thought and the development of original ideas. All change is, to a certain extent, achieved by the opposition of the new to the old, and in so far as it is within the law, such peaceful opposition is guaranteed to our people and is recognized as a symbol of independent thought containing the promise of progress. It may be permitted as a means of political evolution, but not of revolution. This section, however, goes further than prohibiting opposition to organized government, and forbids the display of any flag, badge, banner or device "as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character."

The words "anarchy" and "sedition" have well defined meanings, and the teaching of anarchy and sedition as understood by the laws of our land can well be prohibited by a constitutional statute.

Webster's dictionary defines an anarchist as follows:

64 "One who advocates anarchy or believes in anarchism; one who attempts to establish anarchy; especially, one who believes in or practices terroristic anarchism; a terrorist; a nihilist."

The same authority defines anarchy as:

"Absence of government; the state of society where there is no law or supreme power; hence, a state of lawlessness or political disorder; specifically, the social state that is advocated by modern anarchists."

Black's Law Dictionary, second edition at page 68 defines an anarchist as:

"One who professes and advocates the doctrine of anarchy."

This same authority defines "anarchy" as:

"Destructive of government, lawlessness; the absence of all political government; by extension, confusion in government."

In Cerveny v. Chicago Daily News (28 N. E. 692), the court said:

"It was charged that the defendant falsely and maliciously published of the plaintiff language which is literally transcribed in the declaration charging that the plaintiff is an 'Anarchist.' An
65 'Anarchist' is defined by Webster to be: 'An anarchist; one who excites revolt, or promotes disorder in a state,' and this we assume to be a sufficiently accurate definition of the word. It is, moreover, here alleged that, at the time and place of the publication complained of, it was commonly understood and believed that 'the doctrines, opinions, beliefs, teachings, and tenets of said class, party, or sect called "anarchist," as aforesaid, and of the persons composing said class, party, or sect, is that the law and order of society then, and ever since then, and now, existing should be overthrown by revolution and force.' It can not, therefore, be correctly said that this is no more than charging the plaintiff with being a member of a certain political party; for anarchy, being the enemy of all governments, is necessarily the reverse of a political party, which is always in support of some form of government, and, professedly, of that which is best."

In Lewis v. Daily News Co. of Cumberland (32 Atl. 246), the court said:

"Falsely publishing of an individual that he is an anarchist is libelous." (Cerveny v. News Co. 28 N. E. 692.) "The declaration alleges that an anarchist is universally accepted by all law-abiding persons in all countries as meaning an enemy and conspirator against all law and social order, and as one who uses
66 unlawful, violent, and felonious means to destroy property and human life, and as one who is treasonable to the government under which he lives and employs assassination of persons in authority as means of accomplishing his unlawful designs against society. Obviously, then to publish of and concerning an individual that he is such an enemy of law, of order, of society, and of human life, is grossly libelous, and is far from merely charging him, as suggested in the argument, with being only a political propogandist, advocating visionary schemes; for anarchy, as defined in the declaration, and as generally understood, is avowed hostility to all governments, and open antagonism to all political parties, everyone of which professes to support some form of government, and generally that which its members consider the best. It can not be doubted that all law-abiding, right-thinking men regard with abhorrence the individual who justifies or approves of the bloody and atrocious means to which anarchists resort, the world over, in furtherance of their reckless and revolutionary designs, against every form of government and against every right of property. It is equally apparent that to accuse another of being an anarchist in the sense in which the term is generally accepted is to accuse him

of that which will inevitably injure his reputation, and ex-
67 pose him to obloquy and ignominous reproach."

In People v. Most (73 N. Y. Supplement, 220), the court said:

"We hold that the teachings of the doctrine of anarchy, 'seriously disturb or endanger the public peace'; and also 'openly outrage public decency.' To give this construction to the law in no way abridges the liberty of conscience in matters of religion, nor the freedom of speech on all questions of government or of social life, nor does it in any way trespass upon the proper freedom of the press. The point and pith of the offense of anarchists is that they teach the doctrine that the pistol, the dagger, and dynamite may be used to destroy rulers. The teaching of such horrid methods of reaching an end is the offense. It is poor satisfaction, when one of their dupes has consummated the results of their teaching, to catch him, and visit upon him the consequences of his acts. The evil is untouched if we stop there. In this class of cases the courts and the public have too long overlooked the fact that crimes and offenses are committed by written or spoken words. We have been punishing offenders in other lines for words spoken or written without waiting for an overt act of injury to persons or property. The press is restrained
68 by the law of libel from the too free use of words. Individuals can be punished for words spoken or written, even though no overt act of physical injury follow. It is the power of words that is the potent force to commit crimes and offense in certain cases. No more striking illustration of the criminal power of words could be given, if we are to believe the murderer of our late president than that event presents. The assassin declares that he was instigated and stimulated to consummate this foul deed by the teachings of Emma Goldman. He is now awaiting execution for the crime, while she is still at large in fancied security. A person may advocate any change of our government by lawful and peaceful means, or may criticize the conduct of its affairs, and get as many people to agree with him as he can, so long as he does not advocate the commission of crime as the means through which he is to attain his end. If he advocates stealthy crime as the means of reaching his end, he by that act, commits a crime for which he can be punished. The distinction we have tried to point out has been too long overlooked. If our conclusions are sound, it is the teachers of the doctrine who can and ought to be punished. It is not necessary to trace and establish the connection between the teaching of anarchy and a particular crime of an overt nature. It is a strange
69 spectacle in this age for a great nation to stand mute and paralyzed in the presence of teachers of crime that are advocated only for the purpose of destroying such nation, and it have no power to defend against such internal enemies. We do not believe the arm of the law is too short to reach those offenders against the

life of the nation, or too paralyzed to deal with them. The liberty of conscience, the freedom of speech, or the freedom of the press, do not need such concessions to save to the fullest extent unimpaired those sacred rights of a free people."

It is therefore clear that when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action it prohibits acts which have a well-defined and well-settled meaning in the law of our land, a teaching which if allowed to be put into force and effect would mean revolution in its most dreaded form.

The section in question also prohibits the display of a red flag as an aid to propaganda that is of a seditious nature. Black's Law Dictionary, second edition, page 1067, gives the following definition of "sedition":

"An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the State."

So, also, in Wilkes vs. Shields (64 N. W. 921), the court
70 said:

"The obvious meaning of the words 'seditious agitator,' as they would naturally be understood by ordinary men, when published in reference to another, is that he is a disturber of the public peace and order, a subverter of just laws, and a bad citizen."

In the case of Arizona Publishing Company vs. Harris (181 Pac. 373), "sedition" is defined as follows:

"Sedition is the raising of commotion or disturbances in the State; it is a revolt against legitimate authority."

We therefore conclude that the term "sedition" and the word "seditious" have well-defined meanings in law. That the teaching of sedition against our Government can be and has long been prohibited needs no further citation of authorities.

As we view the provisions of section 403a of the Penal Code, its prohibition of displaying a red flag "as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character" is certain, and a proper and constitutional and legislative enactment. It is not contrary to the provisions of either the State or Federal Constitutions guaranteeing freedom of speech to our people.

The constitutionality of the phrase of this section, "of opposition
to organized government" is questionable. This phrase can
71 be eliminated from the section without materially changing its purposes. The section is complete without it, and with it eliminated it can be upheld as a constitutional enactment by the Legislature of the State of California.

"Where only part of a statute is invalid for any reason, in order to render the whole statute void for the same reason, all of the parts thereof must be so interdependent as that no one part may be eliminated without destroying the force of the whole statute; but

where a statute is valid in one part, and invalid in another, the former part, if not dependent in any measure upon the latter, and can without the latter, accomplish one or all the material purposes of the act, will be sustained, and that which is void will be eliminated and disregarded. It follows that the court will not declare an entire act unconstitutional where the objectionable part can be eliminated without destroying the efficacy of the remainder. The effect of such partial invalidity will then be, that the independent provision, not in its nature and connections essential to the law, may be treated as a nullity, leaving the rest of the enactment, if it comprehend within itself an entire and complete scheme, to stand as valid." (5 Cal. Jur. 644.)

(Mordecai v. Board of Supervisors, 183 Cal. 434; Hunt v.
72 Superior Court, 178 Cal. 470; Ex Parte Cerino, 143 Cal. 412; Johnson v. Tautphaus, 127 Cal. 605; Murphy v. Pacific Bank, 119 Cal. 334; Christy v. Supervisors of Sacramento County, 39 Cal. 3; People v. Barbiere, 33 Cal. App. 770; In re Mitchell, 10 Cal. App. 567; Maclay v. Love, 25 Cal. 367; Matter of Bonds of San Joaquin Irrigation District, 161 Cal. 345; McGowan v. McDonald, 111 Cal. 57.)

Appellant next contends that the verdict is contrary to the evidence and is not supported by the evidence. She bases this contention upon three separate arguments; first, that the place in which the red flag was displayed was not a public place as the term is used in section 403a of the Penal Code. Second, that it was not a meeting place in the sense that the term is used in the same section; third, that the evidence admitted fails to prove that the red flag was a sign, symbol, or emblem displayed "as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character."

A meeting place has been defined by the Supreme Court of Alabama in the case of Finen v. State (115 Ala. 106, 22 So. 593), as including a place in a woods half a mile from the public highway where a number of persons meet for the purpose of engaging in a prohibited activity. The following cases are to the same effect: King v. Brown, 94 S. S. 328; Farrell v. City of Opelika, 89 So.
73 249; Roberts v. The State, 60 S. E. 1082; People v. Whitman, 157 N. Y. Supplement 1107; O'Mally v. McGuinn, 10 N. W. 515.

A "meeting" is defined by Bouvier's Law Dictionary, third edition, volume two, as follows:

"A number of people having a common duty or function who have come together for any legal purpose, or the transaction of business of a common interest; an assemblage."

Bouvier defines an "assembly" as:

"The meeting of a number of persons in the same place. An assembly of persons would seem to mean three or more."

The evidence in this case shows that there were present at the camp at which the red flag was displayed, all of the defendants to

this action, and a number of children, also that there were various adults visiting the camp at different times. The camp was situated upon a farm of about sixty acres, leased from the owner for the purpose of holding these assemblages. It was about one mile from the public highway and was reached by a private road. The flag was displayed each morning in the presence of the children. Under these facts we believe that it was displayed at a public place which was also a meeting place as we have heretofore defined the terms.

A casual reading of the exhibits before us containing quotations from literature found in the library at the camp which was admittedly under the control of appellant, convinces us that the
74 red flag was raised "as an invitation and stimulus to anarchistic action, and as an aid to propaganda that was of seditious character." We have selected at random three quotations from these pamphlets. They are as follows:

"This year is the 150th anniversary of the American revolution of 1776. If the average conscious worker is asked whether the American working class should commemorate the anniversary, his answer is an indignant 'No.' 'It was a bourgeoisie revolution,' he will declare. It created out present capitalist government. The constitution is a capitalist constitution. The Declaration of Independence is bunk. The revolutionary fathers represented the interests of landowners, merchants, and capitalists. It's not our revolution; it gave the working class nothing but exploitation. We have nothing to commemorate. * * * This year, on the 150th anniversary of the American revolution of 1776 it is time that the American working class begins to 'discover America' and its body of native revolutionary traditions. It is time that we grew up and like the youthful Lenin disputed with the bourgeoisie for our heritage. We are the revolutionaries of our day and they the counter-revolutionists. In the words of Lenin we can say: 'We are definitely more consistent
and truer guardians of the inheritance than you.' And to
75 the 'back to the 1776-ers' the Norman Thomases and La Follettes we can add in the words of Lenin: 'To keep the inheritance by no means signifies that one must limit himself to what he has inherited.' 'Back to nothing,' we can answer. 'We use the past to build the future, not to block the present. Forward to communism. * * * After all it is only the first American Revolution.' The chief form of the December movement in Moscow was a peaceful strike and demonstrations. The overwhelming majority of the working masses' activity participated only in these forms of struggle. But just this December action in Moscow has shown plainly that the general strike as an independent and main form of struggle has outlived itself, that the movement with elemental, unrestrainable force surges out of these narrow frames and creates the highest form of struggle—the uprising. The change in the objective conditions of the struggle demanding the transition from the strike to the uprising, was sensed by the proletariat earlier than by

its leaders. Practice, as always, went ahead of theory. Peaceful strike and demonstration all at once ceased to satisfy the workers, who asked: 'What next?' Who demanded more aggressive action? The directive to construct barricades came to the outlying regions with enormous delay while barricades were already being con-
76 structed in the center. The working masses set to work, but were not satisfied with that, and, asking: 'What next?' they demanded aggressive action. We, the leaders of the social-democratic proletariat, showed ourselves in December to be like that chief of the army who so absurdly disposed his regiments that the greatest part of his troops did not participate actively in the battle. The working masses looked for and did not find directives in regard to mass action. Therefore, there is nothing more short-sighted than the view of Plekhanov which was seized upon by all opportunists, that it was not advisable to begin an untimely strike, that 'they should not have resorted to arms.' On the contrary, it was necessary more resolutely, energetically, and aggressively to resort to arms; it was necessary to make clear to the masses the impossibility of a mere peaceful strike alone, and the necessity of a fearless and ruthless armed struggle. And now we must finally, openly, and to everybody's hearing, acknowledge the insufficiency of political strikes, must agitate among the very broadest masses for the armed uprisings, not covering up this question with any sort of 'preliminary stages,' not throwing any veil over the question. To hide from the masses the indispensability of a desperate, bloody, destructive war as the immediate task of the coming action, means to deceive both
77 oneself and the people. In considering the status of the capitalist order as a world system we can say that American capitalism is the most powerful force fighting against proletarian revolution. The role of the party. This fact is emphasized by the Communist International in its resolution on the controversy within our party. The role which American capitalism is playing in the struggle against the proletarian revolution places a great responsibility on the Workers (Communist) Party. It is our task to carry on the revolutionary struggle against this mighty capitalist power to mobilize the workers against it, and finally to overthrow and destroy it."

Again we read:

"Working men and working women! Exploited and oppressed peoples! Remember that the capitalist world is preparing a new imperialist war and a counter-revolutionary crusade against the first proletarian dictatorship of the world, the fatherland of the international working class. Do not believe the liars in the ranks of the social democracy who wish to lull you into a sense of false security with empty phrases concerning the peaceful intentions of those capitalist states which are even at this moment preparing a new war. Prepare yourselves to turn the counter-revolutionary war against the Soviet Union into a war against imperialism, into
78 a civil war against the bourgeoisie in your own countries. Workers of the world! The Communist International ap-

peals to you to join in a joint struggle against capitalist exploitation, against the yoke of imperialism, against the dictatorship of the bourgeoise, against the preparation of new imperialist wars and interventions, against the pacifist lies and against the social democratic unity with the bourgeoisie and in favor of the class unity of the proletariat in its struggle against imperialist slavery, against the oppression of the colonial and semi-colonial peoples, against reformism and against facism, for the proletarian revolution! Long live the proletarian dictatorship in the Soviet Union! Long live the proletarian world revolution! Long live the world dictatorship of the proletariat! Long live world communism! Moscow, 2nd March, 1929. The executive committee of the Communist International.

"The conquest of power by the proletariat is not the peaceful 'conquest' of the existing bourgeois State machine by means of a parliamentary majority. The conquest of power by the proletariat is the violent overthrow of bourgeois power, the destruction of the capitalist State apparatus (bourgeois armies, police bureaucratic hierarchy, courts, parliaments, etc.,) and its replacement by a new organ of proletarian power, primarily as a weapon for the
79 suppression of the exploiters.

"When the revolutionary tide is flowing, when the dominant classes are disorganized, the masses are in a state of revolutionary ferment, the intermediary strata are inclining towards the proletariat, and the masses are prepared for action and for sacrifice, the task of the party, of the proletariat is to lead the masses into the direct attack upon the bourgeois State. This is to be achieved by propaganda in favour of all transitional slogans (Soviets, workers' control of industry, the slogan of peasant committees for the seizure of the landlords land, etc.), and the organization of mass actions, to which all other branches of party work, agitation and propaganda, including parliamentary work, must be subordinated. This includes strikes, strikes combined with demonstrations, and combinations of armed demonstrations and strikes and finally the general strike conjointly with the armed uprising against the political power of the bourgeoisie. This struggle must be subjected to the rules of military art; it must be conducted according to a plan of war and in the form of a military offensive. It calls for the devoted loyalty and heroism of the proletariat. Such actions must be preceded by the organization of the broad masses in military units, which by their very form attract and set into action the max-
80 imum number of toilers (councils of workers' and peasants' deputies, soldiers' councils, etc.) and by intensified work in the army and the navy.

"Communists do not think it necessary to conceal their views and intentions. They openly declare that their goal can be achieved only by the violent overthrow of the whole of the present social system. Let the dominant classes tremble before the communist revolution! The proletariat has nothing to lose but its chains! It has the whole world to gain! Workers of all countries, unite!"

Lastly we quote as follows:

"Have these gentry (the anti-authoritarians) ever seen a revolution? Revolution is undoubtedly the most authoritarian thing in the world. Revolution is an act in which one section of the population imposes its will upon the other by rifles, bayonets, guns, and other such exceedingly authoritarian means. And the party which has won is necessarily compelled to maintain its rule by means of that fear which its arms inspire in the reactionaries. If the Commune of Paris had not relied upon the armed people as against the bourgeoisie would it have maintained itself more than twenty-four hours? Are we not, on the contrary, justified in reproaching the commune for having employed this authority too little?"

81 In reading the foregoing extracts from the literature at the camp we must bear in mind that appellant was on the committee which organized and had charge at the camp, that she was present each time the red flag was raised and led the children in the pledge of allegiance to the flag "and to the cause for which it stands," and that the literature from which we have quoted, discloses the cause for which the red flag stands, a cause which advocates wholesale murder in the most terrible form of revolution. Under these circumstances there is more than ample evidence to sustain the conviction of appellant, Yetta Stromberg.

The judgment against all of the defendants, under the second count of the information, who have appealed to this court, is reversed, with instructions to the trial court to grant their motion for a new trial so that appropriate action under this second count may be taken in accordance with the conclusions we have reached herein.

The judgment of the conviction of the appellant, Yetta Stromberg, under the first count of the information is affirmed.

MARKS,
J.

I concur.

BARNARD,
Acting P. J.

82 In District Court of Appeal of California, Fourth Appellate District

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF and respondent *vs.* BELLA MINTZ, ESTER KARPELIFF, I. BERKOWITZ, Sarah Cutler, Yetta Stromberg, Jennie Wolfson, and Emma Schneiderman, defendants and appellants	4 Crim. No. 17.

Order denying rehearing

By the court: The petition for rehearing is denied.

BARNARD, *Acting P. J.*

Dated: July 7, 1930.

83 In Supreme Court of California in bank

PEOPLE
vs.
MINTZ, KARPELIFF, STROMBERG, ETC. } Crim. No. 3368.
4 Crim., No. 17

Order denying petition to hear and determine

By the court: Appellant's petition to have the above-entitled cause heard and determined by this court after judgement in the District Court of Appeal of the Fourt Appellate District is denied.

Dated this 24th day of July, 1930.

WASTE, *C. J.*

I, B. Grant Taylor, clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this court, as shown by the records of my office.

Witness my hand and the seal of the court this 18th day of October, A. D. 1930.

[SEAL.]

B. GRANT TAYLOR, *Clerk.*
By L. F. WHITE, *Deputy Clerk.*

84 In District Court of Appeal of California

[Title omitted.]

Petition for appeal, assignment of errors, and prayer for reversal filed Sept. 11, 1930

Petition for appeal

Considering herself aggrieved by the final decision of the District Court of Appeal of the State of California in and for the Fourth Appellate District rendered in said court on June 27, 1930, and by the order of the Supreme Court of the State of California made on July 24, 1930, denying her petition to that court to hear and determine this cause after judgment in the said District Court of Appeal, appellant Yetta Stromberg, a defendant in the above-entitled case, and the only defendant making this petition, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon, and for an order approving said bond, and that said bond act as a supersedeas.

Assigment of errors

And the said appellant, Yetta Stromberg, assigns the following errors in the record and proceedings in the said case:

1. The District Court of Appeal of the State of California in and for the Fourth Appellate District, in its opinion, decision,
85 determination, and judgment of the case of the People of the State of California vs. this appellant, erred in holding

that the statute of the State of California, to wit: Penal Code of the State of California, sec. 403a, for a violation of which this appellant was prosecuted by the people of the State of California, does not and did not deprive any person or persons, including this appellant, of their or her libery without due process of law, in violation of sec. 1 of the 14th amendment of the Constitution of the United States.

2. That the said District Court of Appeal of the State of California in and for the Fourth Appellate District, in its opinion, decision, determination, and judgment of the case of the People of the State of California vs. this appellant, erred in holding that the said statute of the State of California, for a violation of which this appellant was prosecuted, to wit: Penal Code of the State of California, sec. 403a, did not or does not deny to any person within the jurisdiction of the said State, of whom this appellant is one of such persons, the equal protection of the laws, in violation of sec. 1 of the 14th amendment to the Constitution of the United States.

3. That the said District Court of Appeal of the State of California in and for the Fourth AppellateDistrict, in its opinion, decision, determination and judgment of the case of the People of the State of California vs. this appellant, erred in holding that the said statute of the State of California, for a violation of which this appellant was prosecuted, to wit: Penal Code of the State of California, sec. 403a, did not or does not abridge the privileges or immunities of citizens of the United States, of whom this appellant is one.

4. That the said District Court of Appeal of the State of California in and for the Fourth Appellate District, in its opinion, decision, determination and judgment of the case of the People
86 of the State of California vs. this appellant, erred in holding that the statute of the State of California to wit: Penal Code of the State of California, sec. 403a, for a violation of which this appellant was prosecuted by the People of the State of California, as construed and applied in this case by the State courts of California, does not and did not deprive any person or persons, including this appellant, of their or her liberty without due process of law, in violation of sec. 1 of the 14th amendment of the Constitution of the United States.

5. That the said District Court of Appeal of the State of California in and for the Fourth Appellate District, in its opinion, decision, determination, and judgment of the case of the People of the State of California vs. this appellant, erred in holding that the said statute of the State of California, for a violation of which this appellant was prosecuted, to wit: Penal Code of the State of California, sec. 403a, as construed and applied in this case by the State courts of California, did not or does not deny to any person within the jurisdiction of the said State, of whom this appellant is one

of such persons, the equal protection of the laws, in violation of sec. 1 of the 14th amendment to the Constitution of the United States.

6. That the said District Court of Appeal of the State of California in and for the Fourth Appellate District, in its opinion, decision, determination, and judgment of the case of the People of the State of California vs. this appellant, erred in holding that the said statute of the State of California, for a violation of which this appellant was prosecuted, to wit: Penal Code of the State of California, sec. 403a, as construed and applied in this case by the State courts of California, did not or does not abridge the privileges or immunities of citizens of the United States, of whom this appellant is one.

87 Prayer for reversal

For which errors the appellant prays that the said judgment of the District Court of Appeal of the State of California, in and for the Fourth Appellate District dated June 27, 1930, in the above entitled cause, be reversed and a judgment rendered in favor of the said appellant, and for costs.

JOHN BEARDSLEY,
Counsel for Appellant.

Dated September 6, 1930.
[File indorsement omitted.]

88 In District Court of Appeal of California

[Title omitted.]

Order allowing appeal filed Sept. 11, 1930

The appellant, Yetta Stromberg in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and rendered in the above entitled cause by the District Court of Appeal of the State of California in and for the Fourth Appellate District on the 25th day of June, 1930, and from each and every part thereof, and having presented and filed her petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the District Court of Appeal of the State of California in and for the Fourth Appellate District in the above entitled cause, as provided by law, and it is further ordered that the clerk of the said District Court of Appeal shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the
89 Supreme Court of the United States, so that he shall have the same in said court within sixty days from this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $250.00.

Dated September 6, 1930.

W. P. CARY,
Presiding Justice of the District Court of Appeal of the State of California in and for the Fourth Appellate District.

[File endorsement omitted.]

90–91 [Bond on appeal omitted in printing.]

92 [Praecipe for transcript of record omitted in printing.]

93 [Order fixing bail, etc., omitted in printing.]

94–95 [Citation and service omitted in printing.]

96–97 [Clerk's certificate omitted in printing.]

98 In Supreme Court of the United States

[Title omitted.]

Statement of points upon which appellant intends to rely, and of the parts of the record necessary for the consideration thereof, filed January 20, 1931

In compliance with the requirements of paragraph 9, rule 13, of the Supreme Court, appellant hereby submits her definite statement of the points on which she intends to rely in this appeal, and of the parts of the record which she thinks necessary for the consideration thereof, with proof of service of the same on the adverse party.

Points relied upon

Section 403a of the Penal Code of the State of California, upon which the prosecution in the trial court was based, inherently and as construed and applied in this case, is violative of the Constitution of the United States, as more particularly set out below. The code section cited is as follows:

"Any person who displays a red flag, banner, or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building, or window as a sign, symbol, or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character, is guilty of a felony."

Appellant contends that said section 403a, inherently and as construed and applied in this case, violates the 14th amendment to the Constitution of the United States in that it:

99 1. Abridges the privileges and immunities of the citizens of the United States, of whom appellant is one.

2. Deprives appellant of her liberty without due process of law.

3. Denies to appellant, a person within its jurisdiction, the equal protection of the laws.

4. Penalizes, by imprisonment, the display in a public place or in a meeting place of the flag of the Communist Party of the United States, a legally constituted and functioning political party, with which appellant, as a citizen of the United States, is affiliated.

5. Deprives this appellant of her political liberty, and liberty of expression and freedom of speech.

6. Punishes by imprisonment this appellant, a citizen of the United States, for her adherence to a legally organized and functioning political party, namely the Communist Party.

7. Punishes by imprisonment this appellant, a citizen of the United States, for the display in a public place, or a meeting place, of the flag of Soviet Russia, a Government with which the United States is at peace.

8. Is so broad and inclusive in its terms as to penalize the display of a flag as an emblem of peaceable and orderly as well as violent opposition to organized government, or of philosophical and non-violent as well as violent anarchistic action, or as an aid to seditious propaganda; and is, therefore, void for uncertainty.

100 Parts of the record necessary for the consideration of the foregoing points

1. The Information. (Clerk's transcript page 1.)

2. The record of presentation and filing and overruling of the demurrer to the information. (Clerk's transcript page 5.)

3. The judgment of imprisonment of appellant. (Clerk's transcript, page 36, lines 1 to 22, inclusive; page 37, lines 4 to 8, inclusive, lines 13 to 28, inclusive; page 38, lines 1 to 16, inclusive.)

4. The trial court's instruction No. 17. (Clerk's transcript, page 27, beginning at line 14, and ending at bottom of page 28.)

5. The opinion and decision of the District Court of Appeal of the State of California, in and for the Fourth Appellate District, affirming the judgment, dated June 27, 1930, copy of which is on file with the clerk of this court with the transcript. (Reported in 62 Cal. Ap. Dec. page 788.)

6. Copy of the order of the Supreme Court of California denying appellant's petition to said Supreme Court to hear and determine the cause after judgment in the District Court of Appeal, dated July 24, 1930, copy of which is on file with the clerk of this court with the transcript.

7. Appellant's petition to the District Court of Appeal of California for an order allowing her to appeal to the Supreme Court of the United States, copy of which is on file in this court with the transcript.

8. The order of the District Court of Appeal of California allowing the appeal, copy of which is on file in this court with the transcript.

9. The stipulation of facts, attached hereto.

Respectfully submitted.

JOHN BEARDSLEY,
Attorney for Appellant.

101 In Supreme Court of the United States

[Title omitted.]

Stipulation of facts filed Jan. 20, 1931

For the convenience of the court and the shortening of the record, The People of the State of California, appellee, by Hon. U. S. Webb, attorney general, their attorney, and Yetta Stromberg, appellant, by John Beardsley, her attorney, present this stipulation of facts:

In the latter half of July and the first two or three days of August, 1929, appellant and others supervised a summer camp for about 40 children between about 10 and 15 years of age, on a rented ranch property in the foothills of the San Bernardino Mountains, a few miles from the town of Yucaipa, in San Bernardino County, California. The camp was distant one mile from the nearest public highway and accessible by private road upon private property passing through two gates. One man and about seven women were the only adults at the camp. The man, Isadore Berkowitz (a naturalized citizen of the United States and of Russian birth, did the heavier work and assisted the women in ministering to the comforts of the children. The women, other than appellant, did the cooking, washing, and other usual work. Appellant led the children in their study hour daily, teaching them history and economics. Among other things the children were taught class consciousness, the solidarity of the workers, and the theory that the workers of the world are of one blood and brothers all. Appellant Yetta Stromberg
102 was and is a citizen of the United States, born of Russian parents at Cleveland, Ohio, and celebrated her 19th birthday at the camp in July, 1929. She was the only person at the camp who was a member of the camp conference which was responsible for the establishment and maintenance of the camp, and which conference was made up of delegates from half a dozen organizations, all or nearly all of which were communistic or affiliated with the Communist Party. Appellant was a member of the Young Communist League, an international organization affiliated with the Communist Party, and whose members were too young for membership in the Communist Party. She was a graduate of Roosevelt High School and had had a year as a student at the University of California, at Los Angeles. In that summer of 1929 she was actively engaged in communist agitation and propaganda work.

At the camp Miss Stromberg supervised and directed the children in their ceremony of raising a flag, which was a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States. There was testimony that the oneness of blood of the workers of the world was symbolized by the red background, upon which background was superimposed a likeness of a sickle and a hammer. The sickle, Miss Stromberg testified, represented the farmers, and the hammer represented the

industrial workers. Several days in succession at about 7 o'clock in the morning, the children under the direction of Miss Stromberg stood at salute beside their beds in the open air, while the flag was raised on an improvised flagpole upon a high spot a few hundred feet from the children's beds. In unison the children recited their pledge as follows:

"I pledge allegiance to the worker's red flag, and to the cause for which it stands; one aim throughout our lives, freedom for the working class."

103 The flag was taken down and put away until the next morning.

A library was maintained at the camp, containing a large number of books, papers, and pamphlets, including much radical communist propaganda, specimens of which are quoted in the opinion of the State court. A number of the books and pamphlets bore the name of appellant in pen or pencil, some in her own handwriting, and others in the writing of an undisclosed person. Apellant admitted ownership of a number of them. She testified, however, that none of the literature in the library, and particularly none of the exhibits containing radical communist propaganda, was in any way brought to the attention of any child or of any other person, and that no word of violence or anarchism or sedition was employed in her teaching of the children. There was no evidence to the contrary. There was evidence, however, that programmes and "stunts" were put on in the evenings, including playlets satirizing and attacking capitalism, although none of them expressed opposition to organized government or advocacy of anarchism or sedition.

An eleven year old girl testified that they were addressed by a visiting speaker. When asked, "What did he say about the Government of the United States?" she replied, "He said he didn't want a government, or something like that. I am not sure."

There was also received in evidence an excerpt from the minutes of the so-called "camp conference," which promoted and

104 managed the camp, to the effect that books and pamphlets were needed at the camp library and that the secretary was to try and get some from the Communist Party headquarters in Los Angeles.

On or about August 1, 1929, the camp was "raided" by the district attorney and sheriff and some citizens of San Bernardino County. All the adults were arrested and the camp activities were terminated. All the children were sent to their homes excepting three who were detained and used as witnesses by the prosecution. One man and six women, including appellant, were charged by the information with violation of section 403a of the Penal Code of California, and in a second count with conspiracy to violate said law.

A general demurrer to the information was overruled. Criminal procedure in California permits the raising of constitutional ques-

tions by general demurrer. In the argument on demurrer, counsel for appellant contended that the statute was violative of the 14th amendment to the Federal Constitution, as well as the Con-
105 stitution of California. The demurrer was overruled, the defendants pleaded not guilty, and their trial ensued. All of the defendants except one woman, Sarah Cutler, were convicted of conspiracy under the second count. All of the defendants excepting appellant, Yetta Stromberg, were acquitted of the charge of actually displaying the flag, under the first count, upon which appellant was found guilty. Berkowitz, the one male defendant, committed suicide after the verdict and before sentence. Appeal was taken to the District Court of Appeal where the convictions of all the appellants on the conspiracy charge were reversed, and judgment against appellant Stromberg was affirmed on June 27, 1930. Petition for rehearing was denied. Petition to the Supreme Court of California to hear and determine the cause after judgment in the District Court of Appeal, was denied July 24, 1930. Subsequently the charge was dismissed as to all appellants excepting Miss Stromberg. She is at liberty upon bond pending this appeal. The indeterminate sentence system prevails in California and the term of imprisonment of appellant under the law is from six months to five years in the State penitentiary at San Quentin.

Dated: Los Angeles, California, January 16, 1931.

U. S. WEBB, *Attorney General.*
By JOHN D. RICHER, *Deputy,*
Attorney for Appellee.
JOHN BEARDSLEY,
Attorney for Appellant.

[Indorsed:] Copy received Jan. 16. 1931. U. S. Webb, atty. gen., by John D. Richer, deputy.

[File endorsement omitted.]

[Indorsement on cover:] In-forma-pauperis. File. No. 35,506. California, District Court of Appeal, Fourth Appellate District. Term No. 584. Yetta Stromberg, appellant, *vs.* The People of the State of California. Filed December 9, 1930. File No. 35,506.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

Supreme Court, U.
FILED
MAR 28 1931
CHARLES ELMORE CROPL
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 584

YETTA STROMBERG, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

BRIEF OF APPELLANT.

JOHN BEARDSLEY,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 584

YETTA STROMBERG, APPELLANT,

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THE PEOPLE OF THE STATE OF CALIFORNIA.

BRIEF OF APPELLANT.

Citation of Opinion of Court Below.

In compliance with Subdivision *b* of Rule 27, appellant refers to the official report of the opinion delivered in the court below; the opinion has not yet been printed in the bound volumes of the California Appellate Reports; the citation in the Advance Sheets is 62 Cal. App. Decisions, 788.

Statement as to Jurisdiction on Appeal.

In compliance with Subdivision *c* of Rule 27, appellant submits her statement, particularly disclosing the basis on which it is contended this Court has jurisdic-

tion to review, on appeal, the judgment below. Such statement is on file with the Clerk, but because it was typewritten, and printed copies have not been provided, it is presented herewith, as follows:

A.

Statutory Provisions Sustaining Jurisdiction.

Act of February 13, 1925, Chap. 229, 43 Stat. 936, and particularly Section 237 (*a*) of the Judicial Code, as amended by said act.

A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, of treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

An Act in Reference to Writs of Error, Chap. 14, 45 Stat. 54, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in*

> *Congress assembled,* That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be applicable by appeal.

Section 2 (as amended April 26, 1928, Chap. 440, 45 Stat. 466):

> The statutes regulating the right to a writ of error, defining the relief which may be had therein, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error.

B.

Date of Decree and Date of Application for Appeal.

The decree, order and judgment sought to be reviewed was entered in the Supreme Court of California on July 24, 1930 (R. 19), and in the District Court of Appeal in the State of California in and for the Fourth Appellate District on June 27, 1930 (R. 4).

Appellant's petition for rehearing was denied July 7, 1930 (R. 18).

The application for appeal was presented on September 11, 1930 (R. 19), and allowed September 11, 1930 (R. 21).

C.

Nature of Case and Ruling Below.

This appeal is brought to this Court to test the constitutionality of Section 403*a* of the Penal Code of

California, known as the "Red Flag Law". Appellant contends that the statute violates the 14th Amendment, and particularly the due-process clause.

The statute reads as follows:

> "SECTION 403*a*. Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character, is guilty of a felony."

The Superior Court of the State of California in and for the County of San Bernardino, in which the case was tried, overruled appellant's demurrer, in the argument of which the constitutional question was raised (R. 2, Stipulation of Facts, R. 24, 26).

The District Court of Appeal of California, in its decision affirming the conviction of appellant, held that the statute is not repugnant to the Constitution (R. 4, 8), and the Supreme Court of California denied appellant's petition to that Court to hear and determine the cause after judgment in the District Court of Appeal.

D.

Cases Applicable to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Martin vs. Hunter, 4 L. Ed. U. S. 97;

Hamblin vs. Western Land Company, 37 L. Ed. U. S. 267;
Re Buchanan, 39 L. Ed. U. S. 884;
Kipley vs. Illinois, 42 L. Ed. U. S. 998;
Whitney vs. California, 71 L. Ed. U. S. 1095.

Those cases established the jurisdiction of this Court to review the judgment of State courts on Federal constitutional questions on writs of error.

As set forth in subdivision A hereof, the statutes applicable to writs of error are now applicable to the appeal which the new section substitutes for the writ of error.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of the foregoing.

Respectfully submitted,

JOHN BEARDSLEY,
Counsel for Appellant.

Statement of the Case.

In compliance with subdivision *d* of Rule 27, the following statement of the case is respectfully submitted:

Primarily the purpose of this appeal is to test the constitutionality of Section 403*a* of the Penal Code of California, commonly referred to as the California Red Flag Law and set out in full in subdivision *C* of the foregoing statement as to jurisdiction on appeal. So far as we know, the constitutionality of this statute or of any similar statute never has been determined by this Court. Although the law was enacted in 1919, this prosecution, instituted in the Superior Court of the State of California in and for the County of San Bernardino by the filing of an information on August 26, 1929 (R. 1, 2), is the first and only prosecution ever instituted under this statute. California's Criminal Syndicalism Law, also enacted in 1919, was before this Court in *Whitney vs. California*, 274 U. S. 357; 71 L. Ed. 1095, and its constitutionality was upheld. The New York Criminal Anarchy Statute, similar, but not identical, in content and phrase, was upheld as to its constitutionality by this Court in *Gitlow vs. New York*, 268 U. S. 652; 69 L. Ed. 1138. Both of those statutes specifically denounce and prescribe punishment for the employment or advocacy of force and violence as a means to political or industrial change. The statute now before the Court differs from the statutes reviewed in the *Whitney* and *Gitlow* cases in that it does

not mention force or violence, but is all inclusive in its condemnation of the display of a flag as an emblem of opposition to organized government, or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character.

The Facts.

A stipulation of facts was filed January 20, 1931, and is printed at pages 24, 25, and 26 of the record. More briefly stated, they are as follows:

In the summer of 1929 about 40 children, between 10 and 15 years of age, of workingmen's families were in camp on a ranch property in the foothills of the San Bernardino Mountains, a few miles from the town of Yucaipa, in San Bernardino County, California. One man and six women were the only adults at the camp, which was promoted and maintained by a so-called camp conference, a delegate body of 24 representatives of half a dozen organizations, principally Communist in their affiliations and purposes. One of those we have classified as adults was the appellant Yetta Stromberg, an American girl, born of Russian immigrant parents at Cleveland, Ohio, and a citizen of the United States. She celebrated her 19th birthday at the camp. She was a camp director and had charge of the educational hour in which the children participated daily. Miss Stromberg taught the children history and economics, class consciousness, the solidarity of the workers, and the theory that the workers of the world are of one blood and brothers all.

Appellant was the only person at the camp who was a member of the camp conference. She was a member

of the Young Communist League, an international organization affiliated with the Communist Party, whose members are too young for membership in the party. She was a graduate of Roosevelt High School in Los Angeles, and had had a year as a student at the University of California, in Los Angeles.

In that summer of 1929 she was actively engaged in communist agitation and propaganda work. At the camp she supervised and directed the children in their ceremony of raising a flag, which was a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States. Miss Stromberg testified that the oneness of blood of the Workers of the World was symbolized by the red background, upon which was superimposed a likeness of a sickle, representing the farmers, and a hammer, representing the industrial workers. Several days in succession, at about 7 o'clock in the morning, the children, under the direction of Miss Stromberg, stood at salute beside their beds in the open air while the flag was raised on an improvised flagpole upon a high spot a few hundred feet from the childrens' beds. In unison the children recited their pledge, as follows:

> "I pledge allegiance to the Workers' red flag,
> And to the cause for which it stands;
> One aim throughout our lives,
> Freedom for the working class."

The flag was then taken down and put away until the next morning.

A library was maintained at the camp, containing a large number of books, papers, and pamphlets, includ-

ing much radical communist propaganda, specimens of which are quoted in the opinion of the State Court. A number of the books and pamphlets bore the name of appellant in pen or pencil, some in her own handwriting, and others in the writing of an undisclosed person. Appellant admitted ownership of a number of them. She testified, however, that none of the literature in the library, and particularly none of the exhibits containing radical communist propaganda, was in any way brought to the attention of any child or of any other person, and that no word of violence of anarchism or sedition was employed in her teaching of the children. There was no evidence to the contrary. There was evidence, however, that programmes and "stunts" were put on in the evenings, including playlets satirizing and attacking capitalism, although none of them expressed opposition to organized government or advocacy of anarchism or sedition.

An 11-year-old girl testified that they were addressed by a visiting speaker. When asked, "What did he say about the Government of the United States?" she replied, "He said he didn't want a government, or something like that. I am not sure."

There was also received in evidence an excerpt from the minutes of the camp conference which promoted and managed the camp to the effect that books and pamphlets were needed at the camp library, and that the secretary was to try and get some from the Communist Party headquarters in Los Angeles.

The study hour was only one feature of the camp activities. The children played baseball and other games, hiked in the mountains, were read to from Huckleberry Finn and other stories, had frequent showerbaths, and occupied their time generally about as any group of children on vacation would.

On or about August 1, 1929, the camp was "raided" by the District Attorney and Sheriff and some citizens of San Bernardino County. Quantities of communist books, papers and pamphlets were seized and many inflammatory excerpts were read aloud to the jury at the trial of appellant and the six other adults upon the charges of violating and conspiring to violate Section 403*a* of the Penal Code. All of the evidence that the flag stood for opposition to organized government or anarchism or sedition came from this communist literature confiscated at the camp.

Miss Stromberg assumed at the trial all responsibility for the display of the flag, which she testified was not raised as an emblem of opposition to organized government or as a stimulus to anarchistic action or as an aid to propaganda that is of a seditious character. She said it was the flag of Russia and of the Communist Party in America. And that fact was and is undisputed.

Appellant was found guilty by the jury on both counts of the information, the first count charging actual display of the flag in violation of the law and the second count charging conspiracy so to violate the law. All the other defendants were acquitted on the first count, and five others besides appellant were found

guilty on the conspiracy count. The District Court of Appeal reversed the convictions of all on the conspiracy count, so that appellant is the only remaining defendant in the case, the judgment against her on the first count having been affirmed.

Specification of Errors.

In compliance with subdivision *e* of Rule 27, we submit the following specification of such of the assigned errors as are intended to be argued. The assignment of errors is printed at pages 19, 20 and 21 of the record. Summarized, they are:

That the District Court of Appeal erred in holding that Section 403*a* of the Penal Code of California does not:

(1) Deprive appellant of her liberty without due process of law;

(2) Deny appellant the equal protection of the laws;

(3) Abridge the privileges or immunities of citizens of the United States, of whom appellant is one;

(4) As construed and applied in this case, deprive appellant of her liberty without due process of law;

(5) As construed and applied in this case, deny to appellant the equal protection of the laws;

(6) As construed and applied in this case, abridge the privileges or immunities of citizens of the United States, of whom appellant is one.

Further, and more specifically, as set out in the statement of points relied upon (R. 22, 23), appellant con-

tends that said Section 403*a* inherently, and as construed and applied in this case, violates the 14th Amendment of the Constitution of the United States, in that it:

(1) Abridges the privileges and immunities of the citizens of the United States, of whom appellant is one.

(2) Deprives appellant of her liberty without due process of law.

(3) Denies to appellant, a person within its jurisdiction, the equal protection of the laws.

(4) Penalizes, by imprisonment, the display in a public place or in a meeting place of the flag of the Communist Party of the United States, a legally constituted and functioning political party, with which appellant, as a citizen of the United States, is affiliated.

(5) Deprives this appellant of her political liberty and liberty of expression and freedom of speech.

(6) Punishes by imprisonment this appellant, a citizen of the United States, for her adherence to a legally organized and functioning political party, namely, the Communist Party.

(7) Punishes by imprisonment this appellant, a citizen of the United States, for the display in a public place, or a meeting place, of the flag of Soviet Russia, a Government with which the United States is at peace.

(8) Is so broad and inclusive in its terms as to penalize the display of a flag as an emblem of peaceable and orderly as well as violent opposition to or-

ganized government, or of philosophical and non-violent as well as violent anarchistic action, or as an aid to seditious propaganda; and is, therefore, void for uncertainty.

ARGUMENT.

It is respectfully submitted that this case is important in that it affords opportunity to this Court to declare anew, and to protect and enforce, the American tradition and constitutional guaranty of freedom of speech and of assembly.

An American citizen has been sentenced to the penitentiary for the crime of displaying the flag of a legally constituted and functioning political party, which is also the flag of a nation with which the United States is not at war. The Workers' (Communist) Party had a ticket on the ballot in the general election of 1928 and polled about 50,000 votes for its candidates, Foster and Gitlow, for President and Vice-President. Appellant was affiliated with that party, though not a member. She was a member of the Young Communist League, an international organization affiliated with the Communist Party, whose members were too young for membership in the party itself (R. 24). She was actively engaged in Communist agitation and propaganda work (R. 24). She was an internationalist. She believed in the government of Soviet Russia, and she expressed that belief by participating in the display of a flag of Russia and of the Communist Party at the children's summer camp in the foothills where she was director of the educational and propagandist activities. She was convicted of displaying a flag in a public place

(a summer camp in the remote foothills of San Bernardino County, California) as an emblem of opposition to organized government, and as an invitation and stimulus to anarchistic action, and as an aid to propaganda that is of a seditious character.

Section 403a, Calif. P. C., inherently and as here applied, violates the 14th Amendment, and particularly the due-process clause.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 14th Amendment to the Constitution of the United States.

Freedom of speech and of the press—which are protected by the 1st Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due-process clause of the 14th Amendment from impairment by the states.

Gitlow vs. New York, 268 U. S. 652; 69 L. Ed. 1138;

United States vs. Cruikshank, 92 U. S. 542, 554; 23 L. Ed. 588, 592;

Allgeyer vs. Louisiana, 165 U. S. 578, 589; 41 L. Ed. 832, 835; 17 Sup. Ct. Rep. 427;

Butchers' Union, S. H. & L. Co. vs. Crescent City, L. S. L. & S. H. Co., 111 U. S. 746, 762;

28 L. Ed. 585, 588; 4 Sup. Ct. Rep. 652;
Coppage vs. Kansas, 236 U. S. 1, 14; 59 L. Ed. 441, 446; L. R. A. 1915C, 35 Sup. Ct. Rep. 240;
State vs. Julow, 129 Mo. 172; 29 L. R. A. 257; 50 Am. St. Rep. 443; 31 S. W. 781;
Block vs. Schwartz, 27 Utah, 396; 65 L. R. A. 308; 101 Am. St. Rep. 971; 76 Pac. 22; 1 Ann. Cas. 550; Freund Pol. Power, Sec. 478, p. 513;
Patterson vs. Colorado, 205 U. S. 454; 51 L. Ed. 879; 27 Sup. Ct. Rep. 556; 10 Ann. Cas. 689;
State ex rel. Ragan vs. Junkin, 85 Neb. 1; 23 L. R. A. (N. S.) 839; 122 N. W. 473;
Fox vs. Washington, 236 U. S. 273; 59 L. Ed. 573; 35 Sup. Ct. Rep. 383;
Gilbert vs. Minnesota, 254 U. S. 325, 332; 65 L. Ed. 287, 290; 41 Sup. Ct. Rep. 125;
Neelley vs. Farr, 61 Colo. 510; 158 Pac. 458;
Twining vs. New Jersey, 211 U. S. 78; 96, 97; 53 L. Ed. 97, 104, 105, 29 Sup. Ct. Rep. 14.

Outstanding among the decisions of this Court touching the constitutionality of statutes tending to abridge the freedom of speech are *Schenck vs. U. S.,* 249 U. S. 47; 63 L. Ed. 470; 39 Sup. Ct. Rep. 247, and *Gitlow vs. New York, supra.*

In the Schenck case, the unanimous Court, speaking through Mr. Justice Holmes, established as the test of constitutionality of laws affecting freedom of speech the clear and present danger principle. The prosecution there was for conspiracy to violate the Espionage Act, for conspiracy to use the mails for the transmission of matter declared to be non-mailable by law

and for the actual use of the mails for that purpose. On appeal it was contended that the statute was violative of the constitutional guaranty of freedom of speech. The Supreme Court said:

> "We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. * * * The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."

The clear and present danger in the Schenck case was that the distribution of circulars would cause insubordination, etc., in the military and naval forces of the United States and obstruct the recruiting and enlistment services of the United States when the United States was at war with the German Empire.

In the two counts charging conspiracy, the conspiracy itself, and not the publication and distribution of circulars, constituted the gravaman of the offense. Indeed, it might reasonably be argued that the principle of freedom of speech was involved very little or not at all. It was not the printed words in the circulars that

the prosecution was intended to punish. The words were merely evidentiary of the conspiracy to obstruct the Government in the conduct of the war. All courts, and we presume all intelligent minds, recognize that freedom of speech is not absolute. Persons accused of conspiracy to commit robbery might be shown to have talked a great deal among themselves about the details of their plan. Such evidence, supported by evidence of an overt act, would constitute the proof of the conspiracy charged. No one could claim that the principle of freedom of speech would afford any protection to the words thus spoken by criminal conspirators. Similarly, the printed words of the Schenck circulars were held to be evidence of the conspiracy charged.

In *Gitlow vs. New York, supra,* the prosecution was brought under the New York Criminal Anarchy statute, which had been in force many years before the World War. This Court in that case modified and restricted the clear and present danger doctrine of the Schenck case. It was held that the New York statute is not an arbitrary or unreasonable exercise of the police power of the State, unwarrantably infringing the freedom of speech or press, and, therefore, its constitutionality was sustained. The Court said (268 U. S., p. 670):

> "* * * when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any

specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional, and that the use of the language comes within its prohibition."

Unquestionably, as to the Espionage Law which was involved in the Schenck case, the legislative body (Congress) had determined that clear and present danger existed. As to the New York statute, there was in the law itself no suggestion that clear and present danger existed at the time of its enactment. The Supreme Court said:

"There, if it be contended that the statute cannot be applied to the language used by the defendant because of its prohibition by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases, it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect were to bring about the substantive evil which the legislative body might prevent." (Citing cases.)

"And the general statement in the Schenck case (p. 52) that the 'question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring

> about the substantive evils,'—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."

Without criticising the appropriateness of the language just quoted to the situation in the Gitlow case, we respectfully suggest that there are cases, and the case at bar is one of them, in which the quoted language would not meet the needs of statutory interpretation and construction. Section 403*a* of the Penal Code of California, which is the basis of this prosecution and appeal, provides that it is a felony to display a flag as a sign, symbol, or emblem of opposition to organized government, or as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character. Can it reasonably be said that because the legislature had determined that manifestation of opposition to organized government is felonious, that determination is final and binding upon the courts, and removes the statute from the protection of the freedom of speech? We think that there is no doubt that the phrase "freedom of speech" is to be construed as freedom of expression. As said by the District Court of Appeal of California in its opinion sustaining the constitutionality of this statute (R. 7):

> "The part of the 14th Amendment which might be applicable to the case is the provision

> that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'. Among these privileges undoubtedly, are the rights of free speech and of lawful assembly, which are guaranteed by our State constitution. No matter how revolutionary, in the general sense, a doctrine may be, of our present form of Government, if its adoption in practice is advocated by peaceful and constitutional means—and our constitutions, State and National, provide the means—the open and public advocacy of such doctrine cannot be interfered with."

And again (R. 10) that Court said:

> "It (opposition) might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations."

The Court also said (R. 10):

> "If opposition to organized government were the only act prohibited by this section, we might be forced to agree with appellant" (that the statute is unconstitutional).

We submit that this law, making opposition to organized government a crime, is not to be sustained upon the ground that the legislature, by enacting it, had determined that the natural tendency and probable

effect of such opposition were to bring about the substantive evil which the legislative body might prevent.

Quite different is the legal situation presented by the California Criminal Syndicalism Law, whose constitutionality was upheld (Statutes 1919, Chap. 188, p. 281) by this Court in *Whitney vs. California*, 274 U. S. 357, 71 L. Ed. 1095. There the legislature by its enactment had determined the then existence of clear and present danger. The Act recites in Section 4:

> "Inasmuch as this act concerns and is necessarily to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching, and practicing criminal syndicalism, this act shall take effect upon approval by the Governor."

The California Criminal Syndicalism Law and the California Red Flag Law (Penal Code 403*a*) are sister statutes. Both were enacted and became effective in 1919. By adding Section 4 to the Syndicalism Law the legislature disclosed that they had in mind the advisability, if not the necessity, of announcing their determination that clear and present danger existed in the State, and that the danger must be met by statute. They enacted no such clause, and made no such declaration as to the Penal Code Section 403*a*, here under consideration. May we not reasonably conclude that the determination, that clear and present danger existed, was omitted from Section 403*a* purposely, and for the reason that the legislators believed

there was no clear or present danger in the display of a flag as an emblem of opposition to organized government or of anarchism, or of sedition? May not the maxim *inclusio unius est exclusio alterius* apply? Whether or not the maxim is pertinent, we must determine otherwise than by legislative enactment whether, in the remote recesses of the San Bernardino foothills, in August 1929, there existed clear and present danger that the raising of the flag of Russia and of the Communist Party in the United States would bring about a substantive evil (force and violence against the Government) which the legislative body had the constitutional right to prevent. We find difficulty in imagining a time and place or circumstances in which any sort of danger could be conceived as less clear or more remote. Forty children and seven adults, vacationing in the woods on a ranch, miles from the nearest town, one mile from the nearest public highway, and approached by a private road passing through two gates, can scarcely be pictured as a menace to the stability and life of this Republic.

We submit that Section 403*a* of the Penal Code of California is unconstitutional in that it violates the right of freedom of expression as guaranteed by the due-process law of the 14th Amendment.

From other viewpoints the constitutionality of this statute is equally questionable.

Section 403a is Void for Uncertainty.

This statute not only penalizes the display of a flag as an emblem of any sort of opposition to organized

government. It also brands as a felony the display of a flag as an invitation or stimulus to anarchistic action. All educated men know that there are at least two schools of anarchism. One is the school of violence. Its adherents would dynamite government buildings and assassinate public officers. But there is also a school of non-violent anarchists.

Webster in his definition of the word "anarchism" assigns to that school "the theory that formal government of any kind is unnecessary and wrong in principle; the doctrine and practice of anarchists".

And in defining the word "anarchist", Webster gives first place to this definition, "an advocate of anarchism as a social and political theory".

"Anarchy" Webster defines as "(1) a social theory advocated especially by Pierre Joseph Proudhon (1809-1865), that holds formal government to be unnecessary for the maintenance of order and therefore unjustifiable, regarding individual liberty as the only just rule of society. (2) Want of government; a state of society in which there is no law or supreme power * * *"

"Anarchistic" is defined by Webster as "pertaining to anarchism, favoring or promoting anarchy."

This Court recognized the difference between philosophical anarchism and the anarchism of violence in *United States ex rel. Turner vs. Williams* (1904), 194 U. S. 279; 48 L. Ed. 979; 24 Sup. Ct. Rep. 718, holding that freedom of speech and of the press was not infringed by the Immigration Act of 1903 for the exclusion and deportation of alien anarchists, whether the

statute was construed as applying to persons whose opposition to all organized government was proposed as a political ideal, or simply as including those who advocated the forcible overthrow of government or assassination of officials.

Thus we see that anarchistic action is not at all necessarily violent action, and does not necessarily invite the use of arms or weapons of any kind. In other words, "anarchistic action" is a term broad enough to include violent and non-violent action. "Anarchistic action" might be nothing more or less than political action, that is, action on behalf of the promotion of the social theory advocated by Proudhon, which holds that formal government is unnecessary for the maintenance of order and, therefore, unjustifiable.

Section 403*a* thus brands and punishes as criminal the display of a flag as an invitation or stimulus to anarchistic action, which may be no more than political or theoretical agitation of their cause by those who believe that human beings ought, or may, some time reach that state of civilization in which formal government will be unnecessary and unjustifiable.

As to its second clause, then, we contend that Section 403*a* violates the right of freedom of expression, which includes freedom of speech and freedom of opinion, and that it is void for uncertainty.

As to the final clause of Section 403*a*, penalizing the display of a flag "as an aid to propaganda that is of a seditious character", we contend also that it is void for uncertainty, and because it punishes mere words independently of acts. In this clause, as in both its

other clauses, the statute is so indefinite as not to enable it to be known what is forbidden, and therefore amounts to a delegation by the legislature of the legislative power to courts and juries to determine what acts, or what words, should be held to be criminal and punishable. It leaves it to jurors, in radical cases, swayed by their emotions and influenced by an often hysterical public opinion, to decide whether the printed or spoken words in a given case amount to propaganda that is of a seditious character. Professor Zechariah Chafee, Jr., of Harvard Law School, in his admirable book "Freedom of Speech", says, at page 170, that the crime of sedition was abolished by the 1st Amendment. We suggest that such abolition is effective against the States, as well as against the Federal Government. It is true that State sedition laws in some jurisdictions have been upheld by the State courts of last resort, but we point out that in all such statutes there was specific mention of force and violence as characterizing the sort of seditious utterance that was declared unlawful.

The Connecticuit Sedition Law, Chap. 312 of the Public Laws of 1919, was held constitutional in *State vs. Sinohuk,* 96 Conn. 615, 115 Atl. 33. The statute forbate, and the information charged, the public display of disloyal, scurrilous or abusive matter, *with force of arms,* concerning the government, etc.

Similarly, the Iowa Sedition law was held constitutional in *State vs. Gibson* (1919), — Iowa —, 174 N. W. 34. But there again the statute prescribed

punishment for anyone who should "excite an insurrection by sedition", or should attempt by writing, speaking, or other means to do this, or who should by any means, including speech and writing, advocate the *subversion and destruction by force* of the government of the State or of the United States.

In Montana, the sedition statute of 1918 has been upheld. That is specifically a war-time statute, using the language "whenever the United States is engaged in war", and the Montana court's rulings are in line with this Court's decisions in the Espionage Act cases.

But the State Court decisions are to the contrary in cases where the statutes do not specifically inveigh against the use or advocacy of force and violence against the Government. In *State of New Mexico vs. Diamond*, 202 Pac. 988, a conviction of unlawfully and feloniously attempting to incite revolution and opposition to the State and Federal governments was reversed upon the ground that the New Mexico statute was unconstitutional and void for uncertainty.

In *State vs. Gabriel*, 95 N. J. 337, 112 Atl. 611, the Supreme Court of New Jersey held unconstitutional Section 3 of that State's sedition act, prohibiting membership in any society formed for the purpose of inciting, abetting, promoting or encouraging hostility or opposition to the Government of the United States, or of the State of New Jersey, for the reason stated that the section would apply to any citizen who sought a change in the form of the government by a most peaceful means.

Nowhere have we been able to find decisions upholding statutes which penalize *all* opposition to organized government, or stimulating or inviting *all* or any kinds of anarchistic action, or *all* kinds of "propaganda that is of a seditious character."

For other decisions holding statutes void for uncertainty see *United States vs. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, and cases there cited.

Section 403a is arbitrary and unreasonable, and therefore void.

Although the State is primarily the judge of regulations required in the interest of public safety and welfare, its police statutes may be declared unconstitutional where they are arbitrary and unreasonable attempts to exercise the authority vested in the State in the public interest. *Gitlow vs. New York, supra; Fiske vs. Kansas*, 274 U. S. 380; 71 L. Ed. 1108; 47 Sup. Cr. Rep. 655. We submit that this statute is arbitrary and unreasonable in that it penalizes *all* opposition to organized government, *all* anarchistic action, and *all* seditious propaganda, as synmbolized by a flag or other emblem. The Supreme Court of California passed upon a similar proposition in *In re Hartman*, 182 Cal. 447, wherein the constitutionality of a Los Angeles municipal red-flag ordinance was in question. The ordinance forbade the display of a flag "representative of any nation * * * or organized effort of any nature which in its purposes * * * espouses for the government of the United States * * * principles or theories of government antagonistic to

the constitution and laws of the United States of America, or to the form of government thereof as now constituted * * *." In holding the ordinance unconstitutional, the California Court said:

> "The language of the ordinance is so broad and comprehensive as to render criminal the display or possession of the flag, or emblem of a peaceful organization or society which espoused or advocated amendment of the federal constitution or of our form of government, national or state, in respects admittedly proper from a legal point of view, although giving rise to differences of opinion as to such amendment or change * * *. Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. And it seems equally certain that an organization peaceably advocating such changes may adopt a flag or emblem signifying its purpose, and that the display or possession of such flag or emblem cannot be made an unlawful act."

It is submitted that, in view of the Hartman case decision, Section 403*a* may properly be characterized as arbitrary and unreasonable, and should have been held void upon that ground by the appellate Court below. We suggest also that the refusal of that Court to follow the Hartman decision in the case at bar amounted to a denial of due process.

If Section 403a is unconstitutional as to one or more, though not all, of its clauses, the entire statute is unconstitutional as construed and applied in this case, and the judgment must be reversed.

The District Court of Appeal held substantially that Section 403*a* is unconstitutional in so far as it penalized the display of a flag as an emblem of opposition to organized government, but ruled that as to the clauses touching anarchistic action and seditious propaganda, the statute is not violative of the 14th Amendment.

While we insist that the statute in its entirety is unconstitutional, we point out that even if this Court were to hold that only the opposition to organized government clause is violative of the fundamental law, the judgment herein must be reversed because this statute as construed and applied in this case is unconstitutional. The trial Court in its instruction No. 17 (R. 2) charged the jury that they need not find that the defendants displayed the flag for all three of the purposes enounced by the statute, in order to convict, but that "it is only necessary for the prosecution to prove to you beyond a reasonable doubt that said flag was displayed for any one or more of the three purposes mentioned in the Information (which was in the language of the statute) . . . Proof, beyond a reasonable doubt of any one or more of the three purposes is sufficient to justify a verdict of guilty under count one of said Information."

Who is to say, and how can anyone know, whether the jury, in returning its verdict of guilty, found the defendant Stromberg guilty under count one of dis-

playing a red flag "as an emblem of opposition to organized government", or "as an invitation and stimulus to anarchistic action", or "as an aid to propaganda that is and was of a seditious character"?

Is this Court warranted in concluding that because Section 403*a* of the Penal Code is unconstitutional so far as the phrase "opposition to organized government" is concerned, the jury must have meant to find the defendant and appellant Stromberg guilty of displaying the flag "as an invitation and stimulus to anarchistic action" or "as an aid to propaganda that is and was of a seditious character"?

We think the rule is directly to the contrary. The verdict is based upon the information, which charges that the flag was raised for all three of the purposes named, and upon the evidence, which was received in support of the charge as to all three purposes. As to one of the purposes, namely, displaying the flag as an emblem of opposition to organized government, the statute is clearly unconstitutional. As to that clause the information is bad. The good and the bad are inseparable. The presumption must be that as all three clauses were held good by the trial court, and evidence received in support of all, the judgment is upon all three, hence that it is erroneous.

People vs. Smith, 103 Cal. 563, 567;
People vs. Mitchell, 92 Cal. 590.

A decision of a State Court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under Section 237 of the Judicial Code.

Fiske vs. Kansas, 274 U. S. 380; 71 L. Ed. 1108; 47 Sup. Ct. Rep. 655.

Dahnke-Walker Milling Co. vs. Bondurant, 257 U. S. 282; 66 L. Ed. 239, 242; 42 Sup. Ct. Rep. 106.

Since the abolishment of the writ of error by statute, the remedy is by appeal.

The inquiry, then, is whether the statute is constitutional as applied and enforced in respect of the situation presented.

Fiske vs. Kansas, supra, and cases there cited.

In the case at bar the State Court applied and enforced Section 403*a* against appellant. That there was a distinct and timely existence that if so applied the statute was void under the Federal Constitution, appears from the statement in the stipulation of facts that a general demurrer to the information was overruled, and that criminal procedure in California permits the raising of constitutional questions by general demurrer, and that in the argument on demurrer, counsel for appellant contended that the statute was vio-

lative of the 14th Amendment to the Federal Constitution, and that the demurrer was overruled (R. 25, 26).

This should have been included in the statement as to jurisdiction, *supra*, but the statement there printed was copied from the typewritten statement on file, and we did not deem it proper to make the addition there in view of our statement that it was copied from the typewritten statement on file.

The construction of the statute by the District Court of Appeal of California is binding upon this Court.

Chas. Wolff Packing Co. vs. Court of Industrial Relations, 267 U. S. 552; 69 L. Ed. 785; 45 Sup. Ct. Rep. 441;

Dorchy vs. Kansas, 272 U. S. 306; 71 L. Ed. 248; 47 Sup. Ct. Rep. 86.

In *Fiske vs. Kansas*, this Court held that the Kansas Criminal Syndicalism Law, as applied in the State Court, was "an arbitrary and unnecessary exercise of the police power of the State, unwarranted infringing the liberty of the defendant in violation of the due-process clause of the 14th Amendment." We submit that the same reasoning applies here, and the same rule should govern. The trial Court received in evidence, over the objection of defendants, a mass of communist literature, and permitted the prosecutor to read to the jury for hours such inflammatory excerpts as are set forth in the opinion of the appellate Court below (R. 4; 15, 16, 17, 18). Perhaps as good a sample as any other is this:

> "Communists do not think it necessary to conceal their views and intentions. They openly

declare that their goal can be achieved only by the violent overthrow of the whole of the present social system: Let the dominant classes tremble before the communist revolution. The proletariat has nothing to lose but its chains; It has the whole world to gain; Workers of all countries, unite."

Thus the trial Court applied Section 403*a* of the Penal Code of California to enable a jury of patriotic and excited American citizens to convict of a felony a 19 year old American girl for displaying in a remote summer camp, miles from the nearest city or town, and a mile from the nearest highway, the flag of Soviet Russia and of the Workers (Communist) Party, with which this young woman was affiliated. As applied here, this statute has enabled a jury to find that the flag of Russia, perhaps the most highly organized government in the world, is the emblem of opposition to organized government, and of anarchism, which is the antithesis of organized government, and of sedition, the crime which our forefathers abolished by the 1st Amendment to the Constitution, and which the Congress abhorred so much that it appropriated money to pay back the fines which had been paid for violation of the law. Not all battles are fought upon the field of armed conflict. A battle of another sort is being fought throughout the United States today for the preservation of the fundamental liberties of the people, warranted to them, in the Bill of Rights in the Amendments to the Federal Constitution. In time of war

those rights were flouted by the majority, and restricted and curtailed by the Government, through statutes and the decisions of the courts. But that time has passed, and we have been all too slow in getting "back to normalcy". California, among all the States, has been notably backward in restoring to its people the rights which always have been theirs, but which they had to forego, in the interest of the preservation of the country itself, in time of war.

We respectfully submit that it is the duty of the courts, and theirs the opportunity, to restore to the people the fundamental and traditional right of freedom of expression.

We respectfully submit that the judgment should be reversed.

JOHN BEARDSLEY,
Attorney for Appellant.

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October Term, 1930

No. 584

In the Supreme Court of the United States

YETTA STROMBERG,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Appellee.

Brief of Appellee

Appellant was convicted by the Superior Court of San Bernardino County, California, of a violation of Section 403a of the Penal Code of California which provides as follows:

> "Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."

An appeal was taken from the trial court to the District Court of Appeal, Fourth Appellate District and the decision of the Appellate Court duly affirmed the conviction of Appellant of a violation of Section 403a, which decision is reported in 62 California Appellate Decisions at page 788, under the title People vs. Mintz, Stromberg, et al. A petition was made to the District Court of Appeal for a rehearing and to the Supreme Court of California for a hearing and both petitions were duly denied. This appeal is taken from the decision of the District Court of Appeal, Fourth Appellate District.

The parties hereto have stipulated as to the facts upon which appellant was convicted and the stipulation is printed in the Transcript of Record, pages 24 to 26, and is included in Appellant's Brief. We will, therefore, not repeat the same in our brief.

As stated by Appellant the main purpose of this appeal is to test the constitutionality of Section 403a of the Penal Code, and we respectfully submit the following argument in answer to the contentions presented in Appellant's Brief.

ARGUMENT.

I.

Section 403a of the California Penal Code is Constitutional. It Does Not Violate the 14th Amendment to the Constitution of the United Staes.

It is urged by appellant that Section 403a of the California Penal Code is violative of the due process clause of the 14th Amendment and that it abridges the right of free speech guaranteed by that provision.

Appellee contends that the statute in question is constitutional and in support thereof submits the following:

The freedom of speech guaranteed by the federal constitution is not unlimited and unrestricted, and a state may in the exercise of its police power enact statutes for the protection of the public from utterances and demonstrations which threaten organized government and its overthrow by unlawful means.

Whitney v. California, 274 U. S. 357, 370-73; 71 L. ed. 1095, 1104;
Gitlow v. New York, 268 U. S. 652, 666-668, 69 L. ed. 1138, 1145, 1146, 45 Sup. Ct. Rep. 625, and cases cited.

As the Court concisely stated in *Gitlow v. New York*, 268 U. S. 652, 666, 668, 69 L. ed. 1138, 1146:

> "In short this freedom (of speech) does not deprive a state of the primary and essential right of self preservation, which so long as human governments endure, they cannot be denied. United States ex rel Turner v. Williams, 194 U. S. 279, 294, 48 L. ed. 979, 985, 24 Sup. Ct. Rep. 719. In Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. ed. 1186, 1193, 38 Sup. Ct. Rep. 560, it was said: 'The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions'."

Furthermore, the State of California by its legislature's enactment of Section 403a of the Penal Code has declared that the displaying of a red flag or other badge,

or banner, in the manner and for the purposes therein set forth involves such danger to public welfare and peace, that these acts should be punished in the exercise of its police power. The state having made this determination, we submit that this court must give great weight thereto and resolve every presumption in favor of the constitutionality of the statute.

Whitney v. California, (supra);
Gitlow v. New York, (supra);
Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273.

In the language of this court in *Great Northern R. Co. v. Minnesota,* 246 U. S. 434, 439, 62 L. ed. 817, 820, 38 Sup. Ct. Rep. 346:

> "This court considers a case of this nature in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare. Such statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the state in the public interest."

The foregoing language was also quoted with approval in *Gitlow v. New York,* (supra), and the *Great Northern R. Co.* case was cited with approval in *Whitney v. California,* (supra).

Appellant argues, however, that the legislature had not determined by the enactment of Section 403a of the Penal Code that the display of a red flag or other banner, in the manner and for the purposes therein provided, constituted acts "so inimical to the general welfare and involved such danger of substantive evil that they may

be penalized" in the exercise of the police power of the state. This contention is in effect based upon the fact that the legislature did not specifically state in Section 403a itself that a danger was recognized from the acts therein prohibited, while in the Criminal Syndicalism Law (*Statutes of California*, 1919, Chapter 188, p. 281) a statement occurs which recites the necessity for the act.

Appellee submits, however, that there is no merit to this contention for this court has expressly stated in the cases of Whitney v. California (supra) and Gitlow v. New York (supra) that *"by enacting the present statute,* the legislature has determined" etc. It is to be noted that the statute involved in the Gitlow case contained no recital as to the necessity for such a law and yet the court held that the enactment of the statute was a determination of the question. In other words this determination is made by the legislature by its mere enactment of the law.

Furthermore the sole purpose of the statement in the act to which appellant refers in his argument was to enable the act as an emergency measure to become effective immediately on its approval by the Governor.

Article IV, section 1, para. 4 of the *California Constitution* provides:

> "The second power reserved to the people shall be known as the referendum. No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act, except acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the State, and urgency measures necessary for the immediate

preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each house. Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon; * * *"

Finally the statute in the instant case was sufficiently definite as to the acts which it punished and therefore was a determination by the state that the action prohibited by the state was "inimical to the general welfare and involved such danger of substantive evil, that they may be penalized in the exercise of its police power."

Gitlow v. New York, 69 L. ed. 1146, 268 U. S. 668.

Therefore the only question is whether the Statute constituted an arbitrary and unreasonable exercise of the police power vested in the state. The law on this point was declared in *Gitlow v. New York*, 268 U. S. 652, 659 the court said:

"That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to

measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In People v. Lloyd, supra, p. 35 (136 N. E. 505), it was aptly said:

> " 'Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.'

"We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality."

But it is urged by appellant that Section 403a is arbitrary and unreasonable in that it penalizes *all* opposition to organized government, *all* anarchistic action, and *all* seditious propaganda as symbolized by a flag or other emblem.

Section 403a provides:

> "Any person who displays a red flag, banner or badge, or any flag, badge, banner, or device of any color or form whatever in any public place, or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol, or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character, is guilty of a felony."

Referring first to that portion of this section which interdicts the display of a flag as a symbol of opposition to organized government, we will state at the outset that we do not concur with the holding of the District Court of Appeal when it was said:

> "The constitutionality of the phrase of the section, 'of opposition to organized government' is questionable."

We maintain that this portion of the section is a valid and reasonable exercise of the state's police power.

The statute must be read in the light of Section 4 of the *Penal Code* which provides:

> "The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed accord-

ing to the fair import of their terms, with a view to effect its objects and to promote justice."

We maintain that the state may constitutionally punish the display of a red flag, etc., as a sign, etc., of opposition to organized government since to advocate the overthrow of all organized government is to necessarily advocate a condition of entire lack of government, a condition of chaos and general lawlessness.

While it might be true that the state could not enact a law which interdicted the advocacy of the overthrow of this government, and the substituting of another form of government in its place, yet it would seem that where the overthrow of all organized government is advocated that the state should be entitled to punish such action on the ground that in effect an entire absence of all law and order has been instigated, and furthermore that the teaching of such doctrines threatens breaches of the peace. We submit that this court may take judicial notice of the fact that an entire absence of government would result in disorder, chaos and lawlessness.

An examination of the authorities cited by appellant discloses that in each instance, while the courts say that a peaceful change in *form* of government may lawfully be advocated, yet we have found no decision which states that the abolition of *all* organized government may be lawfully urged.

We therefore maintain that the portion of section 403a which refers to "opposition to organized government" is a valid exercise of the police power. Even assuming for the purpose of argument, however, that this portion of the statute is unconstitutional it is nevertheless sev-

erable from the remaining portions of the act which are entirely valid.

The question as to the severability of these portions of Section 403a is one of interpretation of state statutes.

The District Court of Appeal has interpreted Section 403a in this regard as follows:

> "'Where only part of a statute is invalid for any reason, in order to render the whole statute void for the same reason, all of the parts thereof must be so interdependent as that no one part may be eliminated without destroying the force of the whole statute; but where a statute is valid in one part, and invalid in another, the former part, if not dependent in any measure upon the latter, and can without the latter, accomplish one or all the material purposes of the act, will be sustained, and that which is void will be eliminated and disregarded. It follows that the court will not declare an entire act unconstitutional where the objectionable part can be eliminated without destroying the efficacy of the remainder. The effect of such partial invalidity will then be, that the independent provision, not in its nature and connections essential to the law, may be treated as a nullity, leaving the rest of the enactment, if it comprehend within itself an entire and complete scheme, to stand as valid.' (5 Cal. Jur. 644.)
>
> "(Mordecai v. Board of Supervisors, 183 Cal. 434; Hunt v. Superior Court, 178 Cal. 470; Ex Parte Cerino, 143 Cal. 412; Johnson v. Tautphaus, 127 Cal. 605; Murphy v. Pacific Bank, 119 Cal. 334; Christy v. Supervisors of Sacramento County, 39 Cal. 3; People v. Barbiere, 33 Cal. App. 770; In re Mitchell, 19 Cal. App. 567; Maclay v. Love, 25 Cal. 367; Matter of Bonds of San Joaquin Irrigation District, 161

Cal. 345; McGowan v. McDonald, 111 Cal. 57.)" (Transcript of Record, para. 71, pp. 13 and 14.)

This interpretation by the State Court is binding upon this Court.

Dorchy v. Kansas, 264 U. S. 286, 44 Sup. Ct. Rep. 323, 68 L. Ed. 686;

Gatewood v. North Carolina, 203 U. S. 531, 543, 51 L. Ed. 305, 310, 27 Sup. Ct. Rep. 167;

Guinn v. United States, 238 U. S. 347, 366, 59 L. Ed. 1340, 1348, L. R. A. 1916A, 1124, 35 Sup. Ct. Rep. 926;

Schneider Granite Co. v. Gast Realty and Investment Co., 245 U. S. 288, 290, 62 L. Ed. 292, 294, 38 Sup. Ct. Rep. 125.

Therefore even conceding that the phrase of the section which refers to "opposition to organized government" is unconstitutional, still, if the remaining portions are valid, no objection can be made to the validity of the statute. It is our contention that the remaining provisions of the statute relating to "anarchistic action" and "seditious propaganda" constitute a reasonable and valid exercise of the state's police power.

As above stated the law is well settled to the effect that a state may prevent utterances or acts which incite the overthrow of organized government by unlawful means. *Gitlow v. New York,* supra.

In determining whether or not that portion of section 403a which refers to "anarchistic action" and "seditious propaganda" is a constitutional exercise of the police power it is necessary to determine whether these portions of the section punish utterances or acts which incite the overthrow of organized government by unlawful means.

We must necessarily look to definitions of the terms "anarchy" and "sedition." Referring first to anarchy we find that the District Court of Appeal stated in its opinion (Tr. Rec., p. 10, par. 63):

> "The words 'anarchy' and 'sedition' have well defined meanings, and the teaching of anarchy and sedition as understood by the laws of our land can well be prohibited by a constitutional statute.
>
> "Webster's dictionary defines an anarchist as follows:
>
> "'One who advocates anarchy or believes in anarchism; one who attempts to establish anarchy; especially, one who believes in or practices terroristic anarchism; a terrorist; a nihilist.'
>
> "The same authority defines anarchy as:
>
> "'Absence of government; the state of society where there is no law or supreme power; hence, a state of lawlessness or political disorder; specifically, the social state that is advocated by modern anarchists.'
>
> "Black's Law Dictionary, second edition at page 68 defines an anarchist as:
>
> "'One who professes and advocates the doctrine of anarchy.'
>
> "The same authority defines 'anarchy' as:
>
> "'Destructive of government, lawlessness; the absence of all political government; by extension, confusion in government.'
>
> "In Cerveny v. Chicago Daily News (28 N. E. 692), the court said:
>
> "'It was charged that the defendant falsely and maliciously published of the plaintiff language which is literally transcribed in the decla-

ration charging that the plaintiff is an "Anarchist." An "Anarchist" is defined by Webster to be: "An anarchist; one who excites revolt, or promotes disorder in a state," and this we assume to be a sufficiently accurate definition of the word. It is, moreover, here alleged that, at the time and place of the publication complained of, it was commonly understood and believed that "the doctrines, opinions, beliefs, teachings, and tenets of said class, party, or sect called 'anarchist,' as aforesaid, and of the persons composing said class, party, or sect, is that the law and order of society then, and ever since then, and now, existing should be overthrown by revolution and force." It can not, therefore, be correctly said that this is no more than charging the plaintiff with being a member of a certain political party; for anarchy, being the enemy of all governments, is necessarily the reverse of a political party, which is always in support of some form of government, and, professedly, of that which is best.'"

"In Lewis v. Daily News Co. of Cumberland 32 Atl. 246), the court said:

"'Falsely publishing of an individual that he is an anarchist is libelous.' (Cerveny v. News Co., 28 N. E. 692.) 'The declaration alleges that an anarchist is universally accepted by all law abiding persons in all countries as meaning an enemy and conspirator against all law and social order, and as one who uses unlawful, violent, and felonious means to destroy property and human life, and as one who is treasonable to the government under which he lives and employs assassination of persons in authority as means of accomplishing his unlawful designs

against society. Obviously, then to publish of and concerning an individual that he is such an enemy of law, of order, of society, and of human life, is grossly libelous, and is far from merely charging him, as suggested in the argument, with being only a political propagandist, advocating visionary schemes; for anarchy; as defined in the declaration, and as generally understood, is avowed hostility to all governments, and open antagonism to all political parties, everyone of which professes to support some form of government, and generally that which its members consider the best. It can not be doubted that all law-abiding, right-thinking men regard with abhorrence the individual who justifies or approves of bloody and atrocious means to which anarchists resort, the world over, in furtherance of their reckless and revolutionary designs, against every form of government and against every right of property. It is equally apparent that to accuse another of being an anarchist in the sense in which the term is generally accepted is to accuse him of that which will inevitably injure his reputation, and expose him to obloquy and ignominous reproach.'

"In People v. Most (73 N. Y. Supplement, 220), the court said:

"'We hold that the teachings of the doctrine of anarchy, "seriously disturb or endanger the public peace"; and also "openly outrage public decency." To give this construction to the law in no way abridges the liberty of conscience in matters of religion, nor the freedom of speech on all questions of government or of social life, nor does it in any way trespass upon the proper

freedom of the press. The point and pith of the offense of anarchists is that they teach the doctrine that the pistol, the dagger, and dynamite may be used to destroy rulers. The teaching of such horrid methods of reaching an end is the offense. It is poor satisfaction, when one of their dupes has consummated the results of their teaching, to catch him, and visit upon him the consequences of his acts. The evil is untouched if we stop there. In this class of cases the courts and the public have too long overlooked the fact that crimes and offenses are committed by written or spoken words. We have been punishing offenders in other lines for words spoken or written without waiting for an overt act of injury to persons or property. The press is restrained by the law of libel from the too free use of words. Individuals can be punished for words spoken or written, even though no overt act of physical injury follow. It is the power of words that is the potent force to commit crimes and offenses in certain cases. No more striking illustration of the criminal power of words could be given, if we are to believe the murderer of our late president than that event presents. The assassin declares that he was instigated and stimulated to consummate this foul deed by the teachings of Emma Goldman. He is now awaiting execution for the crime, while she is still at large in fancied security. A person may advocate any change of our government by lawful and peaceful means, or may criticise the conduct of its affairs and get as many people to agree with him as he can, so long as he does not advocate the commission of crime as the means through which he is to

attain his end. If he advocates stealthy crime as the means of reaching his end, he by that act, commits a crime for which he can be punished. The distinction we have tried to point out has been too long overlooked. If our conclusions are sound, it is the teachers of the doctrine who can and ought to be punished. It is not necessary to trace and establish the connection between the teaching of anarchy and a particular crime of an overt nature. It is a strange spectacle in this age for a great nation to stand mute and paralyzed in the presence of teachers of crime that are advocated only for the purpose of destroying such nation, and it have no power to defend against such internal enemies. We do not believe the arm of the law is too short to reach those offenders against the life of the nation, or too paralyzed to deal with them. The liberty of conscience, the freedom or speech, or the freedom of the press, do not need such concessions to save to the fullest extent unimpaired those sacred rights of a free people.'" (Transcript of Record, para. 64, 65, 66, 67, 68, and 69, pp. 10, 11, 12, and 13.)

The District Court of Appeal of California, after citing the foregoing authorities, makes the following comment:

"It is therefore clear that when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action it prohibits acts which have a well-defined and well-settled meaning in the law of our land, a teaching which if allowed to be put into force and effect would mean revolution in its most dreaded form." (Transcript of Record, para. 69, p. 13.)

We submit that the foregoing conclusion of the court is entirely sound.

In other words the use of the language in the statute above quoted is susceptible of only one logical and reasonable interpretation, namely, that the display of a red flag or banner for the purpose of stimulating the overthrow of government by violent and unlawful means is prohibited.

The District Court of Appeal further states with reference to that portion of the opinion which refers to seditious propaganda.

> "The section in question also prohibits the display of a red flag as an aid to propaganda that is of a seditious nature. Black's Law Dictionary, second edition, page 1067, gives the following definition of 'sedition':
>
> "'An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the State.'
>
> "So, also, in Wilkes vs. Shields (64 N. W. 921), the court said:
>
> "'The obvious meaning of the words "seditious agitator," as they would naturally be understood by ordinary men, when published in reference to another, is that he is a disturber of the public peace and order, a subverter of just laws, and a bad citizen.'

"In the case of Arizona Publishing Company vs. Harris (181 Pac. 373), 'sedition' is defined as follows:

> " 'Sedition is the raising of commotion or disturbances in the State; it is a revolt against legitimate authority.'

"We therefore conclude that the term 'sedition' and the word 'seditious' have well-defined meanings in law. That the teaching of sedition against our Government can be and has long been prohibited needs no further citation of authorities.

"As we view the provisions of section 403a of the Penal Code, its prohibition of displaying a red flag 'as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character' is certain, and a proper and constitutional and legislative enactment. It is not contrary to the provisions of either the State or Federal Constitutions guaranteeing freedom of speech to our people." (Transcript of Record, para. 69 and 70, p. 13.)

Here again we maintain that the conclusions reached by the District Court of Appeal to the effect that the terms "sedition" and "seditious" have well defined meanings and that such activities against our government may be prohibited by statute are sound.

In other words, it may be stated that the statute's reference to anarchistic and seditious activities has, contrary to the claim of appellant, only one reasonable interpretation, namely, activities which advocate the unlawful and violent overthrow of organized government. Therefore, we submit that the statute is not an arbitrary and unreasonable exercise of police power inasmuch as

it comes within the rule announced in the Gitlow case, namely, "That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring them punishment within the range of legislative discretion is clear."

II.

Section 403a of the California Penal Code is Not Void for Uncertainty.

It is urged that Section 403a of the Penal Code is void for uncertainty in that it penalizes "anarchistic action." This phrase, it is asserted, is susceptible of two interpretations, one which merely connotes a new political theory and the other the overthrow of the government by violent means. Therefore, appellant maintains that the statute is so indefinite that it cannot be known what is forbidden.

As stated under our Point I, we contend that the language of the statute in this regard is very definite and certain, and susceptible of only one interpretation. It will be noted that the statute punishes the display of a red flag, etc., "in any public meeting place or public assembly, or from any house, building, or window, * * * as an *invitation or stimulus to anarchistic action* * * *."

We submit that to give this language its fair and reasonable import, as we are required to do by Section 4 of the Penal Code (supra), we must necessarily conclude that it punishes not the mere belief in a political theory but *the display of a red flag as an invitation or stimulus to the overthrow of the government by means of force and violence.* This is true since the language

refers not to merely a belief in anarchistic doctrines, but to *stimulating and inviting anarchistic action.*

An examination of definitions will be of value. While, as pointed out by appellant, Webster defines an anarchist as "one who advocates anarchy or the absence of government as a political ideal," yet Webster continues, "in popular use, one who seeks to overturn by violence all constituted forms and institutions and all rights of property, with no purpose of establishing any other system of order in the place of that destroyed."

By virtue of Section 4 of the *Penal Code,* it is the foregoing definition which must be applied to the term "anarchistic action." Again we wish to refer this court to the definitions of the terms "anarchy", and "anarchist" as quoted in the Opinion of the District Court of Appeal and set forth herein under our Point I.

For example, in *Cerveny v. Chicago Daily News,* 28 N. E. 692, the court held that the doctrines and teachings of anarchy are that the law and order of society should be overthrown by revolution and force.

Also in *People v. Most,* 13 N. Y. Supp. 220, the court said:

> "The point and pith of the offense of anarchists is that they teach the doctrine that the pistol, the dagger, and dynamite may be used to destroy others."

Keeping in mind the meaning of the terms "anarchy" and "anarchist", let us examine the definition of the word "action."

Webster defines "action" as follows:

"The function or operation of that which acts; the doing of something; *the effecting of an alteration by means of force* or some natural power or virtue."

Thus it would seem quite clear that the statute in question is very definite and certain in that it does not refer to the mere belief in a doctrine of anarchy but to the execution of the prineiples of that doctrine by immediate action, which, according to Webster, implies the use of force.

Appellant also asserts that section 403a is void for uncertainty because the clause which punishes the display of a red flag, etc., as "an aid to propaganda that is of a seditious character," is uncertain as to meaning.

Here again we must turn to definitions.

Webster defines "sedition" in the following language:

"1. A commotion, or the raising of a commotion, in a state not amounting to an insurrection; conduct tending to treason, to-wit, an overt act; excite man or discontent against the government, the resistance to lawful authority.

"2. Dissension, division, schism."

Black's Law Distionary, Second Edition, at page 1067, gives the following definition of "sedition":

"An insurrectionary movement tending towards treason, but wanting an overt act; attempts made by meetings or speeches, or by publications, to disturb the tranquillity of the state."

So, also, in *Wilkes vs. Shields,* 64 N. W. 921 (Minn.) the court said:

> "The obvious meaning of the words 'seditious agitator,' as they would naturally be understood by ordinary men, when published in reference to another, is that he is a disturber of the public peace, and order, a subverter of just laws, and a bad citizen."

In the case of *Arizona Publishing Company vs. Harris*, 181 Pac. 373, "sedition" is defined as follows:

> "The raising of commotions and disturbances in the state; it is a revolt against legitimate authority." (Citing *Bouvier's Law Dictionary*, page 303 (sedition).)

In view of these definitions we contend that the statute is quite definite and certain when it says "as an aid to propaganda that is of a seditious character" for it refers to propaganda "tending towards treason" which "disturbs the tranquillity of the state, disturbs the public peace, and "revolts against legitimate authority."

We therefore submit that appellant's contention that Section 403a is void for uncertainty is without merit.

III.

The Question as to the Constitutionality of Section 403a as Applied Is Not Reviewable on the Record in This Court.

It is contended by appellant that if this court should hold any portion of the statute in question unconstitutional, that the entire section must also be held unconstitutional since it is impossible to determine from the gen-

eral verdict of the jury which part of the statute they concluded that appellant had violated.

In other words, appellant seeks to have this court declare: first, that section 403a of the *Penal Code* of California is unconstitutional as to that portion referring to the display of a flag as an emblem of opposition to organized government; and second, that applying the entire statute to this case there has been an arbitrary and unreasonable exercise of the police power of the state infringing appellant's liberty in violation of the due process clause of the 14th Amendment to the United States Constitution.

Assuming, for the purpose of argument, that this court should hold section 403a invalid in part, we maintain that the question as to whether or not the general verdict of guilty may be referred to the remaining valid portions of the statute is one to be determined by the state court only and cannot properly be considered by this court. In other words, this court cannot determine on this appeal whether a general verdict of guilty may be referred to the valid or invalid portions of the statute under which a conviction was had, because no federal question is presented.

Furthermore, an examination of the record on this appeal discloses that no other federal question than the inherent constitutionality of 403a has been presented to or passed upon by either the Trial Court or District Court of Appeal. Failure to present a federal question precludes appellant from presenting it for the first time in this court.

In *Whitney vs. California*, 274 U. S. 357, 362, 71 L. ed. 1095, 1100, the court said:

"We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other Federal question was presented in and either expressly or necessarily decided by that court. First National Bank v. Kentucky, 9 Wall. 353, 363, 19 L. Ed. 701; Edwards v. Elliott, 21 Wall. 532, 557, 23 L. Ed. 487; Dewey v. Des Moines, 173 U. S. 193, 200, 19 S. Ct. 379, 43 L. Ed. 665; Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, 633, 20 S. Ct. 205, 44 L. ed. 299; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248, 22 S. Ct. 120, 46 L. Ed. 171; Haire v. Rice, 204 U. S. 291, 301, 27 S. Ct. 281, 51 L. Ed. 490; Selover, Bates & Co. v. Walsh, 226 U. S. 112, 126, 33 S. Ct. 69, 57 L. Ed. 146; Missouri Pacific Railway v. Coal Co., 256 U. S. 134, 135, 41 S. Ct. 404, 65 L. Ed. 864. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. Dewey v. Des Moines, supra, 199 (19 S. Ct. 379); Keokuk & Hamilton Bridge Co. v. Illinois, supra, 634 (20 S. Ct. 205.)"

In order to escape the effect of the foregoing authorities appellant by her last point claims that she did by timely objection preserve the question of the constitutionality of Section 403a as applied in the instant case.

The rule in this connection is that, before this court can hold the entire statute as applied to the particular facts presented in this case violative of the due process clause of the federal constitution, it must first appear that timely objection was made specifying the particulars

in which the statute, as applied under the charge, would be repugnant to the 14th Amendment.

Fiske v. Kansas, 274 U. S. 380.

In the Fiske case the record disclosed that the defendant at the outset moved to quash the indictment for the reason

> "* * * that it failed to specify the character of the organization in which he was alleged to have secured members. This was overruled."

In *Whitney v. California*, 274 U. S. 357, 362, the court said:

> "And here, since it *appears from the statement* in the order of the Court of Appeal that the question whether the Syndicalism Act *and its application in this case* was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, *was considered and passed upon by that court* —this being a Federal question constituting an appropriate ground for a review of the judgment—we conclude that this Court has acquired jurisdiction under the writ of error. The order dismissing the writ for want of jurisdiction will accordingly be set aside." (Italics ours.)

In the instant case the record merely discloses that a general demurrer was filed and that in arguing this demurrer defendant's counsel generally urged the unconstitutionality of Section 403a as violative of the 14th Amendment to the Federal Constitution. (Tr. of Rec., 25 and 26.) Nowhere does it appear in the record that defendant ever urged or presented for consideration to any of the state courts the question of the unconstitu-

tionality of the statute as applied in the case at bar.

Under these circumstances the point has not been properly preserved for review by this court.

Conclusion.

In conclusion, we wish to call this Court's attention to the fact that the evidence overwhelmingly supports appellant's conviction on all three portions of Section 403a of the Penal Code of California. There can be no question but that there was ample evidence to justify the jury's verdict in finding appellant guilty of displaying a red flag, as a sign or symbol of opposition to organized government, of displaying a red flag as an invitation or stimulus to anarchistic action and of displaying a red flag, as an aid to propaganda of a seditious character. Appellant, an American citizen of Russian parentage, was deliberately training children of immature years, incapable of forming an independent judgment, to become traitors to their country and was teaching them doctrines which advocate the overthrow of our government by violent and unlawful means. This fact was evidenced by the Communist literature prepared for the use of the children which disclosed the radical and revolutionary principles of the Communist party, and also by the pledge which the children took each morning as they stood at attention and saluted the red flag. They repeated, "We pledge allegiance to the Workers' Red Flag and the cause for which it stands." We quote in this regard from the opinion of the District Court of Appeal:

> "In reading the foregoing extracts from the literature at the camp we must bear in mind that appel-

> lant was on the committee which organized and had charge at the camp, that she was present each time the red flag was raised and led the children in the pledge of allegiance to the flag 'and to the cause for which it stands,' and that the literature from which we have quoted, discloses the cause for which the red flag stands, a cause which advocates wholesale murder in the most terrible form of revolution. Under these circumstances there is more than ample evidence to sustain the conviction of appellant, Yetta Stromberg." (Trans. of Record, page 18, para. 81.)

We maintain that there is no merit in the contention that the actions of appellant were entirely harmless. While it is true that the children she was training would not be likely to commit immediately any acts of violence, yet she was creating in them the spark which, when fanned, might burst into a great conflagration. As stated by this Court in *Gitlow v. New York,* 69 L. ed. 1146, 268 U. S. 652, 669:

> "The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances

of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

Appellee therefore respectfully submits that Section 403a of the *Penal Code* of California is a valid and reasonable exercise of the State's police power and is not violative of the 14th Amendment of the Constitution of the United States. The judgment of the District Court of Appeal of California should therefore be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 584.—October Term, 1930.

Yetta Stromberg, *vs.* The People of the State of California.	Appeal from the District Court of Appeals of the State of California, Fourth Appellate District.

[May 18, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The appellant was convicted in the Superior Court of San Bernardino County, California, for violation of Section 403-a of the Penal Code of that State. That section provides:

"Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."

The information, in its first count, charged that the appellant and other defendants, at the time and place set forth, "did wilfully, unlawfully and feloniously display a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propaganda that is and was of a seditious character."

The information contained a second count charging conspiracy, but this need not be considered, as the conviction on that count was set aside by the state court. The appellant alone was convicted on the first count.

On the argument of a general demurrer to the information, the appellant contended, as was permitted by the practice in California, that the statute was invalid because repugnant to the Fourteenth Amendment of the Federal Constitution. The demurrer was overruled, and the appellant pleaded not guilty. Con-

viction followed, motions for a new trial and in arrest of judgment were denied, and on appeal to the District Court of Appeal the judgment was affirmed. 62 Cal. App. Dec. 788. Petition for a hearing by the Supreme Court of California was denied, and an appeal has been taken to this Court.

This Court granted an order permitting the appellant to prosecute the appeal *in forma pauperis* and, for the purpose of shortening the record, a stipulation of facts has been presented on behalf of the appellant and the Attorney General of the State. It appears that the appellant, a young woman of nineteen, a citizen of the United States by birth, was one of the supervisors of a summer camp for children, between ten and fifteen years of age, in the foothills of the San Bernardino mountains. Appellant led the children in their daily study, teaching them history and economics. "Among other things, the children were taught class consciousness, the solidarity of the workers, and the theory that the workers of the world are of one blood and brothers all." Appellant was a member of the Young Communist League, an international organization affiliated with the Communist Party. The charge against her concerned a daily ceremony at the camp, in which the appellant supervised and directed the children in raising a red flag, "a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States". In connection with the flag-raising, there was a ritual at which the children stood at salute and recited a pledge of allegiance "to the worker's red flag, and to the cause for which it stands; one aim throughout our lives, freedom for the working class." The stipulation further shows that "a library was maintained at the camp containing a large number of books, papers and pamphlets, including much radical communist propaganda, specimens of which are quoted in the opinion of the state court". These quotations abundantly demonstrated that the books and pamphlets contained incitements to violence and to "armed uprisings", teaching "the indispensability of a desperate, bloody, destructive war as the immediate task of the coming action". Appellant admitted ownership of a number of the books, some of which bore her name. It appears from the stipulation that none of these books or pamphlets were used in the teaching at the camp. With respect to the conduct of the appellant, the stipulation con-

tains the following statement: "She" (the appellant) "testified, however, that none of the literature in the library, and particularly none of the exhibits containing radical communist propaganda, was in any way brought to the attention of any child or of any other person, and that no word of violence or anarchism or sedition was employed in her teaching of the children. There was no evidence to the contrary".

The charge in the information, as to the purposes for which the flag was raised, was laid conjunctively, uniting the three purposes which the statute condemned. But in the instructions to the jury, the trial court followed the express terms of the statute and treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named. The instruction was as follows:

"In this connection you are instructed that if the jury should believe beyond a reasonable doubt that the defendants, or either of them, displayed, or caused to be displayed, a red flag, banner, or badge, or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place, as charged in count one of the information, and if you further believe from the evidence beyond a reasonable doubt that said flag, badge, banner, or device was displayed, or caused to be displayed, as a sign, symbol, or emblem of opposition to organized government, or was an invitation or stimulus to anarchistic action, or was in aid to propaganda that is of a seditious character, you will find such defendants guilty as charged in count one of the information.

"In this connection you are instructed that if you believe a red flag, such as herein described, was displayed in either of the places mentioned in said information, that it is only necessary for the prosecution to prove to you, beyond a reasonable doubt, that said flag was displayed for any one or more of the three purposes mentioned in the information; in other words, if the prosecution should prove to you beyond a reasonable doubt that the red flag, such as herein described, was displayed at the place or either of said places and for the purposes and objects as alleged in said information, it is only necessary for the prosecution to prove to you beyond a reasonable doubt that said flag was displayed for only one or more of the three purposes alleged in said information, and it is not necessary that the evidence show, beyond a reasonable doubt, that said red flag was displayed for all three purposes charged in said information. Proof, beyond a reasonable doubt of any one or more of the three purposes alleged in said information is sufficient to justify a verdict of guilty under count one of said information."

Appellant, before the District Court of Appeal, accepted this instruction as correct and waived any claim of error on that account. But appellant continued her challenge of the constitutionality of the statute, and the court on appeal entertained her contention and decided the constitutional question against her. In the District Court of Appeal there were three justices, and the concurrence of two justices was necessary to pronounce a judgment. (Cal. Const., Art. VI, Sec. 4 (a); Cal. Stats., 1929, Ch. 691, pp. 1202, 1203.) Two opinions were delivered, one by a single justice, and another by the remaining two justices. The three justices concurred with respect to the affirmance of the conviction of the appellant under the first count, and there was a dissent only in relation to the proceedings on the reversal of the judgment under the second count for conspiracy, a point not in question here. The opinions make it clear that the appellant insisted that, under the Fourteenth Amendment, the statute was invalid as being "an unwarranted limitation on the right of free speech".

As the trial court had treated the three purposes of the statute disjunctively, and the appellant had accepted that construction, we think that the only fair interpretation of her contention is that it related to the validity, not merely of the statute taken as a whole, but of each one of the three clauses separately relied upon by the State in order to obtain a conviction. Her concession as to the interpretation of the statute emphasizes, rather than destroys, that contention. The opinion of the two concurring justices explicitly states: "She" (the appellant) "directs her argument to the phrase in section 403a of the Penal Code 'of opposition to organized government.'" Thus directing her argument, we do not think that it can properly be said that the appellant having agreed that, according to the terms of the statute, her conviction could rest exclusively upon that ground, was not contending that the statute was invalid to the extent that it was so applied.

We are not left in doubt as to the construction placed by the state court upon each of the clauses of the statute. The first purpose described, that is, relating to the display of a flag or banner "as a sign, symbol or emblem of opposition to organized government", is discussed by the two concurring justices. After referring, in the language above quoted, to the constitutional ques-

tion raised by the appellant with respect to this clause, these justices said in their opinion:

"If opposition to organized government were the only act prohibited by this section we might be forced to agree with appellant. 'Opposition' is a word broad in its meaning. It has been defined as follows:

"'The act of opposing or resisting; antagonism. The state of being opposite or opposed; antithesis; also, a position confronting another or a placing in contrast. That which is, or furnishes an obstacle to some result; as, the stream flows without opposition. The political party opposed to the ministry or administration; often used adjectively as, the opposition press.'

"It might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations. Progress depends on new thought and the development of original ideas. All change is, to a certain extent, achieved by the opposition of the new to the old, and in so far as it is within the law, such peaceful opposition is guaranteed to our people and is recognized as a symbol of independent thought containing the promise of progress. It may be permitted as a means of political evolution, but not of revolution."

With respect to the second purpose described in the statute, the display of a flag or banner "as an invitation or stimulus to anarchistic action", the concurring justices quoted accepted definitions and judicial decisions as to the meaning of "anarchistic action." These authorities, as set forth and approved in the opinion, show clearly that the term was regarded by the state court as referring to the overthrow by force and violence of the existing law and order, to the use of "unlawful, violent and felonious means to destroy property and human life." The conclusion was thus stated: "It is therefore clear that when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action it prohibits acts which have a well-defined and well-settled meaning in the law of our land, a teaching which if allowed to be put into force and effect would mean revolution in its most dreaded form."

The state court further gave its interpretation of the third clause of the statute, that is, in relation to the display of a flag

or banner "as an aid to propaganda that is of a seditious character." Both opinions dealt with the meaning of this clause. Thus in one opinion it is said: "Appellants' counsel concedes that sedition laws which 'interdict against the use of force or violence' are consistently upheld by the courts, and all of the authorities cited by him support that proposition. . . . Sedition is defined as the stirring up of disorder in the State, tending toward treason, but lacking an overt act. Certainly the 'advocacy of force or violence' in overturning the government of a State falls within that definition." The other opinion takes a similar view. Assuming that the local statute is thus construed by the state court as referring to the advocacy of force or violence in the overthrow of government, we do not find it necessary, for the purposes of the present case, to review the historic controversy with respect to "sedition laws" or to consider the question as to the validity of a statute dealing broadly and vaguely with what is termed seditious conduct, without any limiting interpretation either by the statute itself or by judicial construction.

Having reached these conclusions as to the meaning of the three clauses of the statute, and doubting the constitutionality of the first clause, the state court rested its decision upon the remaining clauses. The basis of the decision, as more fully stated in the opinion of the two concurring justices, was this: "The constitutionality of the phrase of this section, 'of opposition to organized government' is questionable. This phrase can be eliminated from the section without materially changing its purposes. The section is complete without it, and with it eliminated it can be upheld as a constitutional enactment by the Legislature of the State of California." Accordingly, disregarding the first clause of the statute, and upholding the other clauses, the conviction of the appellant was sustained.

We are unable to agree with this disposition of the case. The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be

determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

We are thus brought to the question whether any one of the three clauses, as construed by the state court, is upon its face repugnant to the Federal Constitution so that it could not constitute a lawful foundation for a criminal prosecution. The principles to be applied have been clearly set forth in our former decisions. It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech. *Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382. The right is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom. There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions. *Gitlow* v. *New York, supra; Whitney* v. *California, supra.* We have no reason to doubt the validity of the second and third clauses of the statute as construed by the state court to relate to such incitements to violence.

The question is thus narrowed to that of the validity of the first clause, that is, with respect to the display of the flag "as a sign, symbol or emblem of opposition to organized government", and the construction which the state court has placed upon this clause removes every element of doubt. The state court recognized the indefiniteness and ambiguity of the clause. The court considered that it

might be construed as embracing conduct which the State could not constitutionally prohibit. Thus it was said that the clause "might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations." The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside.

As for this reason the case must be remanded for further proceedings not inconsistent with this opinion, and other facts may be adduced in such proceedings, it is not necessary to deal with the questions which have been argued at the bar as to the constitutional validity of the second and third clauses of the statute, not simply upon their face, but as applied in the instant case; that is, to consider the conclusions of fact warranted by the evidence, either as shown by the original record filed with the Court on the present appeal, or as disclosed by the stipulation, as to the import of which the parties do not agree.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 584.—October Term, 1930.

Yetta Stromberg, Appellant, *vs.* The People of the State of California.	Appeal from the District Court of Appeals of the State of California, Fourth Appellate District.

[May 18, 1931.]

Separate opinion of Mr. Justice McReynolds.

This Court often has announced, and scores, perhaps hundreds of times has applied the rule, that it may not pass upon any question in a cause coming from a state court which the record fails to show was there determined or duly presented for determination.

The only federal matter ruled upon by the court below (District Court of Appeals), and the only one there submitted, arose upon the general demurrer to the Information. Did this adequately set forth an offense for which the defendant could be punished without violating the Fourteenth Amendment?

Section 403 a, Penal Code of California, provides—

> "Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."

And the Information charged that the plaintiff "did wilfully, unlawfully, and feloniously display a red flag and banner in a public place and a meeting place as a sign, symbol, and an emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propaganda that is and was of a seditious character."

Below, counsel definitely "stated that he was satisfied that the instructions [to the jury] were correct, and waived any claim of error on that account." Accordingly, decision was not requested upon any question arising out of the charge; no such question was decided. The instructions were properly disregarded and are now unimportant.

The sole matter of a federal nature considered by the Court of Appeals was the claim that the provisions of Section 403 a of the Penal Code were in conflict with the Fourteenth Amendment. It held the statute divisible and that as petitioner stood charged with violating all of the inhibitions therein, some of which were certainly good, the conviction could not be upset even if one paragraph were invalid. The conclusion seems plainly right and, I think, the challenged judgment should be affirmed.

SUPREME COURT OF THE UNITED STATES.

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Mr. Justice Butler, dissenting.

The Court decides that, in so far as § 403a declares it a crime to display a flag for the first purpose specified, "as an emblem of opposition to organized government", the section denies right of free speech, and the court holds that right to be included in the concept of "liberty" safeguarded against state action by the due process clause of the Fourteenth Amendment. It sustains the parts forbidding the public display of a flag "as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character". The count on which the conviction rests charges that the appellant displayed a flag in ways and for all the purposes denounced by the section. Assuming all the clauses of the section to be valid, the display of a flag for the purpose specified in any one of them would be sufficient to warrant conviction. The Court holds the first clause invalid and, finding that the judgment may have rested upon that clause exclusively, sets aside the conviction.

1. I am of opinion that the record affirmatively shows that appellant was not convicted for violation of the first clause.

Shortly prior to the trial of this case, the supreme court of California held invalid a city ordinance purporting to make unlawful the public display of a flag or emblem of an organization espousing for the government of the people of the United States principles antagonistic to our Constitution or form of government. *In re Hartman*, 182 Cal. 447. Under that decision the California lower courts were bound to hold invalid the first clause of § 403a con-

strued as peaceable opposition to organized government. And the record shows that in the case before us counsel and the trial court had that decision in mind.

The instruction quoted and relied on in the opinion here is No. 17, requested by the state's attorney. The opinion construes that instruction as if it stood alone. It does not stand alone. Defendant's attorney did not object or except to it but on the other hand requested, and the court gave, other instructions. They are Nos. 10 and 11 as follows:

"You are instructed that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our constitution, laws, or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis.

"You are instructed that under the Constitution and laws of the United States, and of this State, an organization peaceably advocating changes in our constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis, may adopt a flag or emblem signifying the purpose of such organization, and that the display or possession of such flag or emblem cannot be made an unlawful act."

The effect of the three instructions here referred to was definitely to direct the jury that defendant had the right without limit to advocate peaceable changes in our government, that under our constitution and laws an organization peaceably advocating changes in our government, no matter to what extent or upon what theories or principles, may adopt a flag signifying the purposes of such organization, and that it is impossible to make that unlawful.

2. The record fails to show that, aside from having the trial judge give to the jury these instructions suggested by her, defendant did in any manner separately challenge in the trial court the validity of the first clause.

That question could not have been raised by the demurrer to the information because it charged conjunctively the three purposes that are disjunctively denounced by the section. And the failure of defendant's counsel in any manner to object or except to state's instruction No. 17 coupled with his statement before the district court of appeal (62 Cal. App. 788, 791) that "he was satisfied that the instructions were correct, and waived any claim of error

on that account" indubitably shows that he was of opinion that the giving of defendant's instructions above quoted eliminated all possibility of conviction for the display of a flag as an emblem of peaceable opposition to organized government.

3. And, if defendant at the trial did assail the first clause, that contention is shown by the opinion of the court below to have been definitely waived.

It is there stated that (pp. 789-790): "The part of section 403a necessary to be considered in passing upon the questions raised by the appeal, reads as follows: 'Any person who displays a red flag, ... in any meeting place . . . . as an aid to propaganda that is of a seditious character is guilty of a felony' ". That statement is closely followed by the one showing that defendant's counsel was satisfied with the instructions.

These definite statements in the opinion were agreed to by the three judges constituting the court. They are not in any manner negatived or impaired by the concurring opinion of two of the judges. pp. 792-801. The first clause was discussed in the concurring opinion only for the purpose of showing that, notwithstanding its questionable validity, the rest of the section should be held valid. Clearly these judges did not intend to sustain a conviction resting on the clause so questioned in their opinion.

The full substance of all they say that has any bearing follows (p. 794): "Appellant's contention that section 403a of the Penal Code is unconstitutional on the ground that it is an unwarranted limitation on the right of free speech guaranteed to the people by the Constitutions of the United States and of the State of California, deserves serious consideration. She directs her argument to the phrase in section 403a of the Penal Code; 'of opposition to organized government'. If opposition to organized government were the only act prohibited by this section we might be forced to agree with appellant". After some pages of discussion they conclude as to the second clause (p. 796): "It is therefore clear that when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action it prohibits acts which have a well-defined and well-settled meaning in the law of our land, a teaching which if allowed to be put into force and effect would mean revolution in its most dreaded form."

Turning then to a consideration of the third clause, they say: "The section in question also prohibits the display of a red flag

as an aid to propaganda that is of a seditious nature." After discussion, they conclude (p. 796) that: "The term 'sedition' and the word 'seditious' have well-defined meanings in law. That the teaching of sedition against our Government can be and has long been prohibited needs no further citation of authorities."

Then summing up as to the second and third clauses, they say (p. 797): "As we view the provisions of section 403a of the Penal Code, its prohibition of displaying a red flag 'as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character' is certain, and a proper and constitutional and legislative enactment. It is not contrary to the provisions of either the State or Federal Constitutions guaranteeing freedom of speech to our people".

They refer again to the first clause: "The constitutionality of the phrase of this section, 'of opposition to organized government' is questionable." And, disclosing the purpose of the reference, they say: "This phrase can be eliminated from the section without materially changing its purposes. The section is complete without it, and with it eliminated it can be upheld as a constitutional enactment by the Legislature of the State of California".

I am of opinion that fair consideration of both opinions in all their parts makes it very clear that defendant did not claim below that under the charge the jury might or could have found her guilty of violating the first clause of the section, that the district court of appeal did not decide or consider whether conviction under that clause was or could lawfully be had, and that the validity of the first clause was discussed in the concurring opinion only upon the question whether, if that part of the section were unconstitutional, the other parts must also fail.

4. It seems to me that on this record the Court is not called on to decide whether the mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press or to decide whether such freedom is a part of the liberty protected by the Fourteenth Amendment or whether the anarchy that is certain to follow a successful "opposition to organized government" is not a sufficient reason to hold that all activities to that end are outside the "liberty" so protected. Cf. *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530. *Gitlow* v. *New York*, 268 U. S. 652, 666. *Whitney* v. *California*, 274 U. S. 357. *Fiske* v. *Kansas*, 274 U. S. 380.

I am of opinion that the judgment below should be affirmed.